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No. 98-1904-CFX Title: United States, et al., Petitioners
v.
Leslie R. Weatherhead

Docketed: Court: United States Court of Appeals for
May 27, 1999 the Ninth Circuit

Entry Date Proceedings and Orders

May 27 1999 Petition for writ of certiorari filed. (Response due July 28, 1999)
May 27 1999 Appendix of petitioners filed.
Jun 24 1999 Order extending time to file response to petition until July 28, 1999.
Jul 27 1999 Brief of respondent Leslie Weatherhead in opposition filed.
Aug 10 1999 Reply brief of petitioners United States, et al. filed.
Aug 11 1999 DISTRIBUTED. September 27, 1999
Sep 10 1999 Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 1, 1999. Rule 29.2 does not apply.
SET FOR ARGUMENT December 8, 1999.

Oct 22 1999 Joint appendix filed.
Oct 22 1999 Brief of petitioners United States, et al. filed.
Nov 4 1999 CIRCULATED.
Nov 18 1999 LODGING consisting of twenty copies each of the following, a letter from Stephen Turner, (Nov. 16, 1994) and the US response in opposition to Defendants Motions to Dismiss in US v. Croft, (Oct. 31, 1994) submitted by counsel for the respondent and distributed.
Nov 19 1999 Brief of respondent Leslie Weatherhead filed.
Nov 19 1999 Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
Nov 19 1999 Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 19 1999 Brief amici curiae of National Security Studies, et al. filed.
Nov 23 1999 Motion of Solicitor General to vacate the judgement of the Court of Appeals and remand the case with directions to dismiss the case as moot filed.
Nov 24 1999 Response to above motion requested. Due to be filed by 3 p.m., Wednesday, December 1, 1999.
Nov 24 1999 Record filed.
Nov 29 1999 DISTRIBUTED. December 3, 1999 (page 17)
Dec 1 1999 Opposition of respondent to motion of Solicitor General filed.
Dec 1 1999 LODGING consisting of twenty copies of Executive Order No. 13,142 by which the President amended E.O. No.12,958, submitted by the Solicitor General and

Entry Date

Proceedings and Orders

distributed.

Dec 1 1999	Reply brief of petitioners United States, et al. filed.
Dec 2 1999	Reply brief of petitioner to respondent's opposition to motion to vacate filed.
Dec 3 1999	Adjudged to be VACATED and REMANDED to the United States Court of Appeals for the Ninth Circuit with directions to order the vacation of the judgment of the United States District Court for the Eastern District of Washington and to dismiss the case as moot. Justice Scalia dissents.

(2)

981904 MAY 27 1999

No.

Office of the Clerk

In the Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF JUSTICE; AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney
General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor
General

LEONARD SCHAITMAN

JOHN P. SCHNITKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID R. ANDREWS
Legal Adviser
Department of State
Washington, D.C. 20520

35 p/2

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Freedom of Information Act's national security exemption, 5 U.S.C. 552(b)(1), does not apply to a letter sent in confidence from the government of Great Britain to the Department of Justice concerning a sensitive extradition matter, where the State Department officials' uncontested affidavits explain that disclosure and the resultant breach of the British government's trust will damage the United States' foreign relations both by impairing the United States' ability to engage in and receive confidential diplomatic communications and by impeding international law enforcement cooperation.

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In the Supreme Court of the United States

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LESLIE R. WEATHERHEAD

*ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, the Department of State, and the Department of Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 157 F.3d 735. The opinions of the district court (App. 21a-28a, 29a-42a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 6, 1998. A petition for rehearing was denied on February 26, 1999 (App. 44a-45a). An amended order denying rehearing was entered on March 9, 1999 (App. 46a-47a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISION AND EXECUTIVE
ORDER INVOLVED**

1. Section 552(b)(1) of Title 5, U.S. Code, provides that the Freedom of Information Act's general provisions governing disclosure of government information do not apply to:

[M]atters that are —

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

2. Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (3 C.F.R. 333 (1996)), governing the classification of government information, is set forth at App. 65a-111a.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. III 1997), Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). To that end, FOIA exempts from the government's general duty of disclosure "matters" that an Executive Order "specifically authorize[s] * * * to be kept secret in the interest of national defense or foreign policy," if those matters are "in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1).

Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (3 C.F.R. 333 (1996)), is the currently

applicable order governing the classification of national defense and foreign affairs information. The Order establishes four prerequisites to classification: (1) the information must be classified by an original classification authority (*i.e.*, an Executive Branch official authorized to classify information under the Order); (2) the information must be under the control of the government; (3) the information must fall within an authorized withholding category; and (4) the classification authority must determine that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." Exec. Order No. 12,958, § 1.2(a). "Damage to the national security" is defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." *Id.* § 1.1(l).

Eligible classification categories include "foreign government information" and information concerning the "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order No. 12,958, § 1.5(b) and (d).¹ Information may be classified at one of three levels: "Top Secret," "Secret," or "Confidential." *Id.* § 1.3. Information may be classified as "[c]onfidential" if "the unauthorized disclosure of [the information] reasonably could be expected to cause damage to the national security that the original classi-

¹ Section 1.1(d) of the Executive Order defines "foreign government information" to include "information provided to the United States Government by a foreign government * * * with the expectation that the information * * * [is] to be held in confidence."

fication authority is able to identify or describe." *Id.* § 1.3(a)(3).

2. Sally Anne Croft and Susan Hagan were followers of Indian guru Bhagwan Shree Rajneesh and were high-level officers in the commune that Rajneesh established in Oregon in the 1980s. See App. 2a; *United States v. Croft*, 124 F.3d 1109, 1113 (9th Cir. 1997). When investigations by the United States Attorney for the District of Oregon threatened to expose illegal activities by community members, a number of the commune's officers, including Croft and Hagan, conspired to murder the United States Attorney. *Id.* at 1113-1114. In 1994, Croft and Hagan were extradited from Great Britain to stand trial for that conspiracy. Shortly after their extradition, the British Home Office sent a letter to the Director of the Justice Department's Office of International Affairs concerning the extradition. Both Croft and Hagan were subsequently convicted. *Id.* at 1114. They have since completed their sentences and returned to Great Britain.

Respondent is a criminal defense attorney who represented Croft during her criminal trial. In 1994, respondent submitted a FOIA request to the Departments of Justice and State for a copy of the letter from the British government. App. 2a. The Justice Department had possession of the letter but, because the letter had been created by a foreign government, it forwarded the letter to the State Department for response to the FOIA request. *Id.* at 3a. As it commonly does, the State Department requested the views of the British government on disclosure. *Id.* at 58a. The British government advised that it was "unable to agree to [the letter's] release," because "the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence." C.A. App. Tab 17, Ex. 2 (emphasis in original); App. 3a. The British government further explained that, "[i]n this particular case," a request by representatives of the defendants to see the letter had been "refused on grounds of confidentiality" by the British government. App. 3a. The British government expressed concern that disclosure of even part of the letter would set a "precedent" that "would quickly become common knowledge amongst lawyers dealing with extradition matters." C.A. App. Tab 17, Ex. 2. The State Department subsequently classified the letter as "confidential" and informed respondent that the letter would not be released because it fell within FOIA Exemption 1. App. 3a-4a.

3. Respondent filed suit under FOIA and moved for summary judgment. In opposing the motion, the government submitted the declaration of Peter M. Sheils, the Acting Director of the State Department's Office of Freedom of Information, Privacy, and Classification Review. Mr. Sheils' declaration explained that the letter "was intended by the U.K. Government to be held in confidence" and that violation of that "clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments." App. 52a-53a. As a result of such a breach of confidentiality, Mr. Sheils continued, the British and other foreign governments would be "less willing in the future to furnish information important to the conduct of U.S. foreign relations" and "less disposed to cooperate in foreign relations matters." *Id.* at 53a. Mr. Sheils therefore concluded that disclosure of the document

"would inevitably result in damage to relations between the U.K. and the U.S." *Id.* at 54a.

Notwithstanding the Sheils declaration, the district court granted respondent's motion for summary judgment. App. 21a-28a. The court reversed its ruling, however, on the government's motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. App. 29a-42a.

In conjunction with its Rule 59(e) motion, the government submitted the declaration of Patrick F. Kennedy, the Assistant Secretary of State for Administration. Mr. Kennedy's declaration elaborated upon the "longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials." App. 56a. "Diplomatic confidentiality obtains," he explained, "even between governments that are hostile to each other and even with respect to information that may appear to be innocuous," and "[w]e expect and receive similar treatment from foreign governments." *Id.* at 56a-57a. Mr. Kennedy further stated that, in his judgment, "[t]he information in this [requested] document is of a nature that it is evident that confidentiality was expected at the time it was sent." *Id.* at 57a. For that reason, disclosure of the letter "in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government," because it "may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them." *Ibid.* The resulting "reluctan[ce]" of other governments "to provide sensitive information to the U.S. in diplomatic communications" would

"damag[e] our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role." *Ibid.*

In particular, Mr. Kennedy stressed that disclosure could imperil the United States' international "law enforcement interests such as those involved in the extradition case that is the subject of the document at issue in this litigation." App. 58a. He continued:

Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here.

Ibid.

The district court did not consider the Kennedy declaration adequate to support withholding either, but it did grant the government's request to review the letter *in camera*. The court did so out of a concern that "highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself." App. 27a. "That proved to be the case." *Ibid.* The court explained:

When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and

there is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

*Ibid.*²

4. a. A divided panel of the court of appeals reversed and ordered the letter disclosed. App. 1a-20a. On appeal, respondent abandoned his contention that the letter did not qualify as information concerning "foreign relations or foreign activities of the United States." *Id.* at 7a; Exec. Order No. 12,958 §§ 1.2(a)(1)-(3), 1.5 (d).³ Thus, the only issue to be resolved by the court of appeals was whether the State Department

² Respondent subsequently moved to set aside the district court's judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, asserting that an unidentified British government employee had disclosed the contents of the letter to an unidentified acquaintance of respondent. The district court denied respondent's motion (C.A. App. Tab 35), and he did not appeal that decision.

The district court's grant of the government's Rule 59(e) motion had the effect of denying respondent's motion for summary judgment and rejecting respondent's request for an injunction ordering disclosure (see Compl., C.A. App. Tab 1, at 3). Although the district court did not enter a separate judgment (see Fed. R. Civ. P. 58) following its Rule 59(e) ruling, the parties and the district court treated the Rule 59 order denying disclosure as a final judgment in the government's favor. See Pl.'s Mot. to Set Aside J. FRCP 60(b)(6); Pl.'s Mem. in Supp. of Mot. to Set Aside J. Under FRCP 60(b)(6), at 2, 3, 5; Defs.' Opp'n to Pl.'s Mot. to Set Aside J. Under Fed. R. Civ. P. 60(B)(6), at 2; see also Order to Extend Time to File Appeal, C.A. App. Tab 31.

³ In the district court and the court of appeals, the government argued that the letter also was properly regarded as "foreign government information." That continues to be our position in this Court. Neither the district court nor the court of appeals, however, resolved that issue.

properly determined "that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security"—i.e., "harm to the national defense or foreign relations of the United States"—and whether the Department was "able to identify or describe the damage." App. 7a-8a (citing Exec. Order No. 12,958, §§ 1.1(l), 1.2(a)(4)).

The majority concluded that the "government never met its burden of identifying or describing any damage to national security that will result from release of the letter." App. 9a. Specifically, the majority faulted the Sheils and Kennedy declarations for "focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content 'appear[s] to be innocuous,'" *id.* at 13a. The majority rejected that ground for withholding on the theory that not all information exchanged with foreign governments or all extradition communications are categorically deemed confidential. *Id.* at 14a. The court further declined to give deference to the Executive's classification decision based on the Sheils and Kennedy declarations describing the damage to foreign relations that would result from disclosure. The court explained that deference is not due until the government makes "an initial showing which would justify deference," and here, it concluded, the government's declarations "made no such showing." *Id.* at 16a. The court therefore decided that it should only "look to the individual document itself" in assessing the potential harm to national security. *Ibid.*

The court of appeals then chose to conduct its own *in camera* review of the document. In doing so, the court stated that it gave deference to the "government's perspective of the document." App. 17a. After its *in camera* review, however, the majority labeled the letter

"innocuous," stating that it "fail[ed] to comprehend how disclosing the letter at this time could cause 'harm to the national defense or foreign relations of the United States.'" *Ibid.* The court accordingly reinstated the summary judgment in favor of respondent. *Id.* at 18a.

b. Judge Silverman dissented, App. 18a-20a, finding "no basis in the record to conclude otherwise than that * * * release [of the letter] would cause damage to the national security," *id.* at 20a. He emphasized that the government's declarations of confidentiality and harm were uncontroverted and, indeed, were corroborated by the British government's own refusal on grounds of confidentiality to release the letter. *Id.* at 18a-19a.⁴ Judge Silverman then concluded (*id.* at 20a):

[W]e judges are outside of our area of expertise here. * * * [T]he majority has presumed * * * to make its own evaluation of both the sensitivity of a classified document and the damage to national security that might be caused by disclosure. With all due respect, I suggest that in matters of national defense and foreign policy, the court should be very leery of substituting its own geopolitical judgment for that of career diplomats whose assessments have not been refuted in any way.

c. Following the court's denial of the government's petition for rehearing with suggestion for rehearing en banc (App. 44a-47a), the government filed a motion to stay the court of appeals' mandate pending the filing of a petition for a writ of certiorari. In support of the

⁴ During oral argument, counsel for the United States advised the court of appeals that the British government (which, during the pendency of the appeal, had transitioned from Conservative Party to Labor Party leadership) continued to consider disclosure of the letter to be "out of the question."

motion, the government submitted the declaration of the then Acting Secretary of State Strobe Talbott, who explained (*id.* at 61a) the importance of maintaining the confidentiality of the letter:

Great Britain is perhaps our staunchest and certainly one of our most important allies. On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation, trade disputes, matters before the United Nations Security Council, human rights and law enforcement. In many of these areas we have engaged in diplomatic dialogue with officials of the British in the course of which information was exchanged with an expectation of confidentiality. Such confidential diplomatic dialogue is essential to the conduct of foreign relations.

The Acting Secretary further stated, with respect to the specific context of this case, that the extradition of the two women was "a matter of political sensitivity" to Great Britain. *Id.* at 62a.

Based upon his personal review of the letter, the Acting Secretary concluded that disclosure of Britain's confidential communication "could reasonably be expected to cause damage to the foreign relations of the United States" and, in particular, could impair the "general bilateral relationship between the U.S. and the U.K. on law enforcement and other matters." App. 63a. The Ninth Circuit granted the motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

The judgment of the divided Ninth Circuit panel orders the release of a sensitive and classified diplomatic communication based solely on the majority's own conclusion that the document is "innocuous" and that its disclosure could not reasonably be expected to result in damage to the national security of the United States. In so holding, the court of appeals expressly refused to accord any deference to the declarations of the responsible Executive Branch officials, which explained how disclosure of the document *would* damage the foreign relations of the United States, both with Great Britain and more broadly.

The Ninth Circuit's denial of deference conflicts with the decisions of numerous other courts of appeals, which have consistently given substantial deference to Executive Branch classification judgments and affidavits explaining those judgments. The court's approach also sharply conflicts with repeated rulings of this Court, which recognize that the separation of powers under the Constitution mandates that the Executive Branch's classification decisions be afforded the utmost deference. The court of appeals' decision, moreover, raises issues of significant and enduring importance regarding the protection traditionally accorded to information classified on national security grounds, the United States' ability to obtain confidential and candid communications from foreign governments and to demand equivalent confidentiality for its own communications, this Nation's conduct of highly sensitive international extradition and law enforcement matters, and our relations with a critical ally. Accordingly, this Court's review is warranted.

1. a. The court of appeals' refusal to give any deference to the sworn declarations of Executive officials regarding the basis for classification of the confidential letter from the British Home Office conflicts with the decisions of numerous other courts of appeals, which have consistently accorded such Executive Branch judgments and declarations "substantial weight." See, e.g., *Jones v. FBI*, 41 F.3d 238, 244 (6th Cir. 1994) ("In determining the applicability of Exemption 1, a reviewing court should accord 'substantial weight' to the agency's affidavits regarding classified information."); *McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) ("[C]ourts are required to accord substantial weight to an agency's affidavit concerning the details of the classified status of a disputed record.") (internal quotation marks omitted); *Krikorian v. Department of State*, 984 F.2d 461, 464-465 (D.C. Cir. 1993) (according "substantial weight to an agency's affidavit" about the impact of disclosure on "reciprocal confidentiality"); *Bowers v. United States Dep't of Justice*, 930 F.2d 350, 357-358 (4th Cir.) ("It is imperative that the court consider and accord 'substantial weight to the expertise of the agencies charged with determining what information the government may properly release' where the foreign government expressly requested secrecy and disclosure "would violate an understanding of confidentiality with the foreign government [and] would have a chilling effect on the free flow of information."), cert. denied, 502 U.S. 911 (1991); *Miller v. United States Dep't of State*, 779 F.2d 1378, 1387 (8th Cir. 1985) ("substantial weight"); *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985) (same).⁵ Those

⁵ Cf. *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) (in applying Exemption 3 to information regarding intelligence sources

decisions, unlike the court of appeals' decision here, demonstrate that no "initial showing" by Executive officials is needed in each particular case to "justify" deference; rather, deference is required by the constitutional separation of powers and due regard for the respective institutional roles of the Executive and Judicial Branches.

Resolution of this conflict is important because, in the absence of a single, uniform rule governing the standard of deference owed Executive Branch classification decisions under Exemption 1, FOIA plaintiffs will have an incentive to file suit within the circuit that accords classification judgments the least amount of deference. From a practical perspective, discord in the judicial standards governing review of classification decisions will deny Executive Branch officials and foreign governments a stable framework within which to engage in candid exchanges of diplomatic information, thereby creating a real danger of "restricting the flow of essential information to the Government." *FBI v. Abramson*, 456 U.S. 615, 628 n.12 (1982). It will be of little solace to United States diplomats whose representations of confidentiality are rendered empty promises—or to foreign governments whose secrets are exposed within the Ninth Circuit—that their expectation of confidentiality might have carried the day in another region of the United States.

b. The court of appeals' holding that no deference was owed to the Executive's reasons for maintaining

and methods, the court "must 'accord substantial weight and due consideration to the CIA's affidavits,'" and, if it is "arguable" that the documents qualify for the exemption, the court's review ends); see also *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (equating rule of substantial deference under Exemptions 1 and 3).

the confidentiality of information on national security grounds is also flatly inconsistent with numerous rulings of this Court. For example, in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Court emphasized that the Executive Branch's "authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President [as Commander in Chief] and exists quite apart from any explicit congressional grant." *Id.* at 527. The Court explained:

For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside non-expert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction [of risk to national security] with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Id. at 529 (internal quotation marks, citation, and ellipsis omitted).

Similarly, in *CIA v. Sims*, 471 U.S. 159 (1985), the Court sustained the government's refusal to disclose information on national security grounds, underscoring the inappropriateness of courts superintending Executive Branch judgments about the need to preserve the confidentiality of communications bearing on national security. If foreign governments in the present context, like the intelligence sources in *Sims*, "come to

think that the [United States] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the [United States] in the first place." *Id.* at 175. Further, like this Court in *Sims*, we "seriously doubt" that foreign governments "will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering" (or, here, foreign diplomacy) will order the government's secrets revealed "only after examining the facts of the case to determine whether the [government] actually needed to promise confidentiality in order to obtain the information." *Id.* at 176. *Sims* thus confirms that the State Department's concerns, voiced repeatedly in the declarations of its officials, about the effect of disclosure on the future flow of information regarding extradition and a broad array of other matters are entirely reasonable, and that the court of appeals' refusal to defer to that judgment exceeds the proper bounds of the judicial function.

As the cited decisions indicate, the deference that Executive Branch classification decisions require at each stage of the judicial process derives directly from the separation of powers under the Constitution:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong

in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); accord *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981). Moreover, as the Court recognized in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the President's authority to maintain secrecy is an essential component of conducting foreign affairs:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. * * * "The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch."

Id. at 319.⁶

Given that the rule of deference to Executive Branch classification decisions and foreign policy judgments is rooted in the Constitution itself, the Ninth Circuit's holding that no deference was owed to the explanation by Executive Branch officials of the basis for classification of the confidential letter at issue here—and that deference must be "justif[ied]" by an "initial showing" in each case—implements FOIA's national security exemption in a manner that raises serious separation-of-

⁶ See also Memorandum from John R. Stevenson, Legal Adviser, Dep't of State, and William H. Rehnquist, Assistant Attorney General, Dep't of Justice, Office of Legal Counsel, *The President's Executive Privilege to Withhold Foreign Policy and National Security Information* (Dec. 8, 1969) (chronicling history of presidential refusals to disclose foreign policy information if it was considered contrary to the national interest to do so); *The Federalist* No. 64, at 392-393 (John Jay) (C. Rossiter ed., 1961).

powers concerns. Congress intended no such result. To the contrary, the Conference Report on FOIA expressed Congress's intent that courts accord "substantial weight" to an agency's "unique insights" regarding the necessity of classification. See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974).⁷ It is only by cleaving strictly to that standard of substantial deference, confirmed in the decisions of this Court and other courts of appeals, that a court can conform its FOIA review to the Constitution's command that the "utmost deference" be accorded the Executive's judgment regarding the need for secrecy in the conduct of foreign relations. See *United States v. Nixon*, 418 U.S. 683, 710 (1974).

c. After declining to accord any deference to the Executive Branch declarations setting forth the basis for concluding that disclosure would result in damage to the Nation's foreign relations, the court of appeals reviewed the letter itself *in camera*. In doing so, the court purported to give deference to the "government's perspective of the document" (App. 17a). But that was too little too late.

With respect to timing, the rule of deference has long been regarded as applicable at the outset of any judicial

⁷ See also 120 Cong. Rec. 6808 (1974) (Rep. McCloskey) (FOIA is enacted "with the confidence" that courts "will * * * be very reluctant to override" an agency decision "relative to declassification of such information"); *id.* at 17,021 (Sen. Hruska) ("A judge can overrule the agency's decision to withhold the document only if he is convinced that there is not any reasonable basis for the classification. * * * But the Court cannot, and should not, be able to second-guess foreign policy and national defense experts."); *id.* at 34,166 (Rep. Moorhead) ("[T]he court should give great weight to an affidavit by the Department that this was properly classified."); *ibid.* (Rep. Erlenborn) ("great weight").

proceeding implicating classified materials and, indeed, to limit strictly the appropriateness of a court's relying on *in camera* scrutiny before sustaining the confidentiality of information on national security grounds.⁸

With respect to substance, the separation of powers requires much more than the sort of deference the court of appeals recited here. The court stated that it gave deference to the bare "act of classification" (App. 17a)—but again, it appears, not to the underlying justification set forth in the State Department's formal declarations—and the court otherwise relied solely on its own reading of the letter. Based on that reading, the court declared the letter "innocuous," opining that its release "could not reasonably 'be expected to result in damage to the national security.'" *Ibid.* The court of appeals offered no explanation for its disagreement with both the Department of State and the district court on the consequences of disclosure. It seems clear, however, that the court focused only on the words appearing on the face of the letter and only on the damage to the United States' foreign relations that would result directly and specifically from the release of those words into the public domain. See *id.* at 11a-12a, 13a, 15a.

Thus, the court did not address the impact that the act of disclosure would have on the future ability of the

⁸ See *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (when state secrets privilege is invoked and there is a "reasonable danger" that confidential national security information will be exposed, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers"); *Nixon*, 418 U.S. at 713 (once the Executive invokes a claim of privilege, a court must treat the material "as presumptively privileged" before any decision regarding the propriety of *in camera* review is made).

United States to receive confidential and candid communications in various matters arising in the Nation's relations with Great Britain and other nations, even though the State Department declarations discussed that harm at length. Nor did the court consider that diplomatic exchanges are not isolated transactions and that the State Department's judgment that the letter should remain confidential reflected a sensitive contextual judgment about the effect disclosure would have within the broader framework of an ongoing, wide-ranging, and vitally important relationship with the British government (as well as relationships with other foreign governments). Rather, the expert views of State Department officials, who have the responsibility and experience to see the foreign relations "forest" and not just the particular "tree," were subordinated to the view of two judges that the words in a particular document, considered in isolation, seemed "innocuous." Practically speaking, that is no deference at all. Such minimizing and second-guessing of the State Department's expert judgment in this case cannot be reconciled with the measured and limited approach of other courts of appeals, which have recognized that judicial review in this area is narrow and is confined to assessing whether, in the absence of any evidence of bad faith, there is a plausible connection between the information and the claimed exemption.⁹

⁹ See *McDonnell*, 4 F.3d at 1243 ("logical connection"); *Maynard*, 986 F.2d at 556 (court "will uphold the agency's decision so long as the withheld information logically falls into the category of the exemption indicated") (internal quotation marks omitted); *Bowers*, 930 F.2d at 357 ("If there is no reason to question the credibility of the experts and the plaintiff makes no showing in response to that of the government, a court should hesitate to substitute its judgment of the sensitivity of the information for that of

2. In addition to deviating from the proper standard of deference consistently recognized by other courts of appeals and by this Court, the court below made a second fundamental error in its analysis. As the State Department declarations explained, the damage to the United States' foreign relations that the Executive Order seeks to prevent can derive not only from disclosure of the words written on a confidential piece of paper received from a foreign government, but also from the very act of disclosure and the attendant breach of a foreign government's trust. The court of appeals, however, refused to consider that form of harm on the ground that the government did not show that either all inter-governmental communications or all extradition communications are categorically exempted from disclosure. App. 14a-16a. The court's refusal to consider, let alone defer to, the State Department's assessment of the damage that would result from disclosing such foreign government information is contrary to the rulings of other circuits and of this Court and, in addition, lacks any basis in the text of the Executive Order.

a. The court of appeals' insistence that identifiable harm to national security must arise from within the four corners of the classified document—and not from the repercussions of the breach of confidentiality in its own right—is contrary to the decisions of other circuits. In *Bowers v. United States Department of Justice*, *supra*, for example, the Fourth Circuit upheld the agency's invocation of Exemption 1 where disclosure of

the agency."); *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("Since the agency assessments are both plausible and factually uncontradicted, the trial court would have been remiss in disregarding them."); *Halperin*, 629 F.2d at 149, 150 ("plausible").

the information at issue would, among other things, "violate an understanding of confidentiality with the foreign government[and] would have a chilling effect on the free flow of information between the United States intelligence and law enforcement agencies and their foreign counterparts." 930 F.2d at 357-358; see also *Krikorian*, 984 F.2d at 465 (Exemption 1 applies where release of the document would "jeopardize reciprocal confidentiality") (internal quotation marks omitted); cf. *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("agency determinations of whether the national security could be injured * * * depend[] less on the content of specific documents" than other FOIA exemptions do).

While those court of appeals decisions arose under a previous Executive Order, No. 12,356, 3 C.F.R. 166 (1983), rather than under Executive Order No. 12,958, that happenstance has no bearing on the conflict. Under both Executive Orders, "damage to the national security" is an essential criterion in classification decisions. See Exec. Order No. 12,958, § 1.2(a)(4); Exec. Order No. 12,356, § 1.3(b). Other than requiring officials to identify or describe the asserted damage to national security, Exec. Order No. 12,958, § 1.2(a)(4), the new Executive Order left fundamentally unchanged the specification of what *types* of injuries to the United States' foreign relations will constitute damage to the United States national security. It is on that point that the circuit conflict arises.

As the court of appeals noted (App. 14a), the new Executive Order also eliminated a presumption in the prior Order that the release of foreign government information would damage the United States' foreign relations (see Exec. Order No. 12,356, § 1.3(b) and (c)). That alteration, however, in fact underscores the gap

between the decision below and the rulings of other circuits on the issue of deference. The court of appeals here did not simply fail to heed a generalized presumption; it refused to defer to the expert and individualized judgments of Executive Branch officials focused on the precise disclosure issue before the court.¹⁰

Moreover, and contrary to the court of appeals' apparent view (App. 14a), elimination of the across-the-board presumption that the disclosure of "foreign government information" will *always* harm national security because of the broader impact on diplomatic communications generally plainly does not mean that the disclosure of foreign government information will *never* harm the national security in that way. And, if there were any doubt about whether a document may properly be classified on that basis, the court of appeals was required to defer to the construction of the Executive Order by the Executive officials responsible for its implementation.¹¹ Thus, the revision of the Executive

¹⁰ In any event, the present case was decided on the basis that the classified letter constituted information concerning the "foreign relations or foreign activities of the United States"; the court did not consider its status as "foreign government information." See App. 7a. Nothing in the new Executive Order altered the manner in which "foreign relations or foreign activities" information is classified. See Exec. Order No. 12,958, § 1.5(d); Exec. Order No. 12,356, § 1.3(a)(5).

¹¹ See *Udall v. Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation [of an Executive Order] may not be the only one permitted by the language of the order[], but it is quite clearly a reasonable interpretation; courts must therefore respect it."). Congress intended for this deference to carry over into application of FOIA Exemption 1. See 120 Cong. Rec. 6811 (1974) (Rep. Erlenborn) ("[T]he court would not have the right to review the criteria" under the Executive Order; "[t]he description 'in the interest of the national defense or foreign policy' is descriptive of

Order in no way bars the Executive from showing that particular foreign government communications were made against an established background expectation of confidentiality for diplomatic communications, the breach of which would damage the United States' foreign relations. Rather, elimination of the automatic presumption contemplated only that, in a particular instance, the established norm of confidentiality in diplomatic relations either could be outweighed by other considerations or could be waived. The new Executive Order therefore requires Executive officials to make a judgment that the interest in maintaining the confidentiality of diplomatic discourse should be invoked with respect to each document. The declarations submitted in this case demonstrate that the responsible Executive officials did precisely that, and they explain that disclosure would result in damage to the Nation's foreign relations by undermining that confidentiality.

b. The court of appeals' judgment that the broader harm to national security from breaching the British government's expectation of confidentiality, by itself, was not a valid consideration is in substantial tension with numerous decisions of this Court. Those cases confirm that the Executive Branch's ability to maintain confidential relationships is critical to its ability to obtain information that is vital to the protection of the United States' national security and foreign relations. See, e.g., *Sims*, 471 U.S. at 175 (quoted at page 15-16, *supra*); *Haig*, 453 U.S. at 307 ("[T]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the

the area that the criteria have been established in but does not give the court the power to review the criteria.").

effective operation of our foreign intelligence service.") (emphasis added); *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) ("[I]t is elementary that * * * [o]ther nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept."); *Snepp v. United States*, 444 U.S. 507, 512 (1980) (per curiam) ("The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information.").

Indeed, in *Curtiss-Wright*, *supra*, this Court recounted that President Washington withheld documents underlying the negotiation of the Jay Treaty from Congress — not on the basis of an identification of particular secrets in each document that would harm the United States if disclosed, but because

[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

299 U.S. at 320-321. If the "pernicious influence on future negotiations" was considered a sufficient threat to the public interest for President Washington to refuse to share foreign correspondence even with Congress, a fortiori it is a sufficient basis for withholding the British government's letter from the public under FOIA.

c. In the analogous context of intelligence information, courts of appeals have recognized that the collec-

tion and preservation of information affecting the national security "is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair." *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978). As a result,

[t]he significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).¹²

The same is true in the conduct of foreign relations. The court of appeals' constricted view of the harm to national security that may be taken into account, however, overlooks that the damage attending disclosure of one confidential communication in one extradition case cannot be assessed in isolation. Rather, the harm must be measured by taking "a broad view of the scene" of extradition and other relations between the United States and Great Britain (and other nations) and by keeping in mind that geopolitical developments can give a document a sensitivity that is not apparent to a non-expert from the face of the document. In addi-

¹² See *The Federalist No. 64*, *supra*, at 393 ("Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.").

tion, the analysis of harm to the United States' ability to conduct its relations with other nations must factor in the politically sensitive and volatile context in which a government extradites one of its own citizens to stand trial in a foreign land, and the adverse consequences that might ensue for a foreign government as a result if a confidential diplomatic communication with the United States were disclosed.

d. The court of appeals believed that consideration of the broader harm arising from disclosure was proper only if either *all* information exchanged between governments or *all* extradition information was exempted from disclosure. App. 14a-15a. That all-or-nothing approach lacks any basis in law or logic. It certainly finds no basis in FOIA. Exemption 1 applies to all "matters" that are authorized "under criteria established by an Executive order" to be kept secret "in the interest of national defense or foreign policy," without any suggestion that the exemption is limited to withholding based on the harm that would result if the contents of a document were in the public domain. See 5 U.S.C. 552(b).

Nor does the Executive Order contain any such artificial requirement of categorical treatment. The definition of "damage to the national security" reaches harm "from the unauthorized disclosure of information." Exec. Order No. 12,958, § 1.1(l). That language is most naturally read to include harm emanating either from the information itself or from the very act of disclosure. The fact that the definition goes on to "include the sensitivity, value, and utility of that information" as relevant considerations in assessing the degree of harm (*ibid.*) is beside the point. The ordinary meaning of the word "include" "is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank v. Bismarck*

Lumber Co., 314 U.S. 95, 100 (1941). Accordingly, the Executive Order envisions that other measures of harm may also be considered by classifying agencies, such as broader, institutional impacts on the overall conduct of foreign affairs and extradition matters.

Indeed, the Executive Order separately provides that, if "the release" of classified information will "damage relations between the United States and a foreign government," the document falls within the extraordinary category of information that is exempt from the general ten-year rule for declassification. See Exec. Order No. 12,958, § 1.6(d)(6). That special exception confirms that the damage to foreign relations resulting from release of a document is an independent and highly relevant component of the "[d]amage to the national security" covered by the Executive Order.

In short, the court of appeals erroneously transmogrified the requirement that Executive Branch officials' declarations "identify or describe the damage" to national security that would result from disclosure (Exec. Order No. 12,958, § 1.2(a)(4)) into a requirement of a showing of particularized damage to the national security that is traceable solely to placing the contents of the document at issue in the public domain.

3. The court of appeals' abandonment of traditional principles of deference to Executive Branch classification decisions and foreign policy judgments raises issues of great and enduring importance to the United States. The prospect that courts may make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been "justif[ied]" through an unspecified "initial showing" in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to

foreign relations that may be taken into account—would have an immediate and deleterious impact on the Executive's conduct of diplomatic and other foreign relations. As in *Sims*, there is little reason for foreign governments "to have great confidence in the ability of judges" to make the "complex political [and] historical" judgments that underlie classification decisions, since judges "have little or no background in the delicate business" of foreign diplomacy. 471 U.S. at 176. In particular, if foreign governments cannot reasonably be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will, as a result, be spared the risks to their interests that may attend such exposure, the United States will not be able to obtain the information it so critically needs for the conduct of its foreign relations. The protection accorded confidences of the United States government by other nations may well be eroded in turn. Given the "changeable and explosive nature of contemporary international relations," *Haig*, 453 U.S. at 292, and the breach of trust that disclosure of a foreign government's confidences would occasion in foreign relations generally and in the delicate arena of international law enforcement cooperation in particular, review by this Court is warranted.¹³

¹³ We have lodged copies of the classified document under seal with the Clerk of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
*Acting Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
*Assistant to the Solicitor
General*

LEONARD SCHAITMAN
JOHN P. SCHNITKER
Attorneys

DAVID R. ANDREWS
*Legal Adviser
Department of State*

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF JUSTICE; AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI**

SETH P. WAXMAN
*Solicitor General
Counsel of Record*

DAVID W. OGDEN
*Acting Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
*Assistant to the Solicitor
General*

LEONARD SCHAITMAN

JOHN P. SCHNITKER
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

DAVID R. ANDREWS
*Legal Adviser
Department of State
Washington, D.C. 20520*

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 96-36260
D.C. No. CV-95-00519-FVS

LES WEATHERHEAD, PLAINTIFF-APPELLANT

v.

**UNITED STATES OF AMERICA;
DEPARTMENT OF JUSTICE; UNITED
STATES DEPARTMENT OF STATE,
DEFENDANTS-APPELLEES**

**Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding**

**Argued and Submitted
April 8, 1998—Seattle, Washington
Filed October 6, 1998**

OPINION

**Before: PROCTER HUG, JR., Chief Judge, STEPHEN
REINHARDT and BARRY G. SILVERMAN,
Circuit Judges.**

Opinion by Chief Judge HUG; Dissent by Judge SILVERMAN

HUG, Chief Judge:

Appellant Leslie R. Weatherhead ("Weatherhead") appeals under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The request sought a letter from the British Foreign Office to the United States Department of Justice ("Justice") related to the extradition of Sally Croft and Susan Hagan. The United States Department of State ("State Department") withheld the letter under FOIA Exemption 1, which protects classified information from disclosure. 5 U.S.C. § 552(b)(1). The district court initially ordered the letter's disclosure. The government sought reconsideration of that decision, which the district court granted after conducting *in camera* review and concluding that the letter contained "highly sensitive and injurious material." We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

BACKGROUND

On November 29, 1994, Weatherhead sent identical requests under FOIA to Justice and the State Department seeking a letter dated July 28, 1994 from the British Foreign Office to George Proctor, Director of the Office of International Affairs, Criminal Division, Justice. The letter was related to the extradition of two women, Sally Croft and Susan Hagan, from the United Kingdom to the United States to stand trial for conspiracy to murder the United States Attorney for Oregon. Croft and Hagan were members of the controversial Rajneeshpuram commune in Central Oregon in the 1980's. Believing that the letter contained an official British request that Justice take measures to

avoid prejudice to Croft and Hagan in the district where the *Croft* case was pending, Weatherhead, the lawyer who represented Croft, intended to provide the letter to the district judge presiding over the *Croft* case.

On May 4, 1995, the State Department wrote to say that it had been unable to locate the letter. Two weeks later, Justice reported that it had found the letter, but since it had been created by a foreign government, the letter was forwarded to the State Department's FOIA office for review and response. Weatherhead administratively appealed Justice's failure to produce the letter to Justice's Office of Information and Privacy, which remanded the matter so that the Criminal Division, in consultation with the State Department, could determine if the letter should be released. On August 4, 1995, the State Department sent a letter to the British government which stated that it had received a request for the letter, but "[b]efore complying with this request, [it] would appreciate the concurrence of [the British] government in the release of the document" and to know if it wanted any portions of the letter withheld.

On October 18, 1995, the British government responded that it was "unable to agree" to the letter's release because "the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence." It continued, "In this particular case, requests from representatives of the defendants for sight of the letter have already been refused on grounds of confidentiality." The State Department classified the letter on October 27, 1995. On December 11, 1995, the State Department advised Weatherhead that it had concluded that the letter contained confidential infor-

mation that was properly classified in the interest of foreign relations and therefore would be withheld under FOIA Exemption 1.

PROCEDURAL HISTORY

Weatherhead initiated a suit to compel production of the letter on November 17, 1995 and moved for summary judgment on February 16, 1996. The district court granted Weatherhead's motion for summary judgment, holding that the government failed to demonstrate that the letter was properly classified under Executive Order 12958. The government moved to set aside the judgment under Fed. R. Civ. P. 59(e). Even though it rejected most of the government's arguments for withholding the letter, the district court granted the government's motion for reconsideration.

The court chose to review the letter *in camera* out of concern that "highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself." The court went on:

That proved to be the case. When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and there is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

Thus, the district court concluded that the letter should be withheld and that Weatherhead would have to be satisfied with "the solace of knowing that not only do two high ranking [Department of State] officers believe

disclosure of the subject material injurious to the national interest, but so does an independent federal judge."

On October 16, 1996, Weatherhead filed a motion to set aside the September 9, 1996 decision under Fed. R. Civ. P. 60(b)(6). With this motion, he submitted an affidavit in which he claimed an acquaintance had spoken to a person "employed by the English government" who had disclosed the letter's contents to the acquaintance over the phone. Weatherhead included the information he learned from the acquaintance about the letter's contents in his affidavit. Plaintiff then claimed that the contents of the letter were in the public domain and must be disclosed. The district court denied Weatherhead's 60(b) motion and he did not file an appeal from that ruling to this court. Instead, he directly appeals the district court's grant of the government's motion for reconsideration.

STANDARD OF REVIEW

We apply a two-step standard of review in an appeal from the grant of summary judgment in a FOIA case. *See Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996). We first determine whether the district court had an adequate factual basis for its decision. *See id.* Where the parties do not dispute that the court had an adequate factual basis for its decision, as is the case here since the district court had the actual letter, we review the district court's factual findings underlying its decision for clear error. *See id.* We review *de novo* the district court's determination that a requested document is exempt from disclosure under FOIA. *See id.*

DISCUSSION

"The Freedom of Information Act, 5 U.S.C. § 552, mandates a policy of broad disclosure of government documents." *Maricopa Audubon Soc. v. United States Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) (quoting *Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980)). When a request is made, an agency may withhold a document, or portions thereof, only if the information at issue falls within one of the nine statutory exemptions contained in § 552(b). *Maricopa Audubon Soc.*, 108 F.3d at 1085; *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995). These exemptions are to be narrowly construed. *Id.* The burden is on the government to prove that a particular document is exempt from disclosure. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *Maricopa Audubon Soc.*, 108 F.3d at 1085; *Kamman*, 56 F.3d at 48.

The government relies on Exemption 1, 5 U.S.C. § 552(b)(1), which exempts from FOIA disclosure "matters that are . . . (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

Executive Order No. 12958 ("EO 12958"), 60 Fed. Reg. 19825 (April 20, 1995), is at issue in this case. EO 12958 requires four conditions for classification: (1) the information must be classified by an "original classification authority"; (2) the information must be "under the control of" the government; (3) the information must fall within one of the authorized withholding categories under this order; and (4) the original classification

authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." § 1.2(a).

The first three conditions for classification are not at issue here. Weatherhead never contested that the State Department is an "original classification authority" or that the requested letter is "under the control" of the government. Weatherhead initially contested the third condition, whether the letter fell within an authorized withholding category, but on appeal has not challenged the district court's conclusion that the letter is information concerning "foreign relations or foreign activities of the United States," § 1.5(d).¹

Weatherhead does argue that the government has not shown that the withheld letter satisfies the fourth condition required for classification. Pursuant to EO 12958, § 1.2(a)(4), the original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage."² "[D]amage to the

¹ The district court assumed that the letter involved foreign relations and fell within classification category § 1.5(d) because "the fundamental function of the [State Department] is to oversee foreign relations." Because Weatherhead did not contest this finding in his appellate briefs, he has waived this point on appeal. See *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 584 n.4 (9th Cir. 1993); *Taag Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1353 n.1 (9th Cir. 1990).

² Under the prior Executive Order, such a showing was not required since the "[u]nauthorized disclosure of foreign government information is presumed to cause damage to national security."

national security" is "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." EO 12958 § 1.1(1).

The government bears the burden of showing that the withheld letter meets the exemption requirements of EO 12958 § 1.2(a)(4). 5 U.S.C. § 552(a)(4)(B); *John Doe Agency*, 493 U.S. at 152. The government must give a "particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). To meet its burden, the government must offer oral testimony or affidavits that are "detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Maricopa Audubon Soc. v. United States Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (quoting *Doyle v. FBI*, 722 F.2d 554, 555-56 (9th Cir. 1983)). The purposes of requiring this showing are to "restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Id.* at 977-78. The first purpose is still subject to serious obstacles. A plaintiff seeking production of a document under FOIA is handicapped in this endeavor by the fact that only the agency truly knows

EO 12356 § 1.3(c). The district court pointed out that if the government had not delayed for so long in processing this FOIA request, the request would have been analyzed under the prior Order. The governing executive order is the one in effect when the classification decision is made. See *Lesar v. United States Dept. of Justice*, 636 F.2d 472, 479-80 (D.C. Cir. 1980). In this case, the letter was classified on October 27, 1995. Therefore, EO 12958 applies.

the content of the withheld material. "Effective advocacy is possible only if the requester knows the precise basis for the nondisclosure." *Id.* at 979. The second purpose is, however, easier to accomplish—through *in camera* review. *In camera* review by the district court is appropriate in certain cases, where the government's public description of a document may reveal the very information that the government claims is exempt from disclosure. *Doyle*, 722 F.2d at 556. *Ex parte in camera* review is, of course, a last resort, given that it furthers judicial review but abrogates the adversary process to a significant extent.³ See *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1116 (9th Cir. 1988) (*in camera* review, as a last resort, can also provide an adequate basis for decision). Still, in certain FOIA cases that form of inquiry may be essential if the courts are to fulfill their proper role. See *Pollard v. F.B.I.*, 705 F.2d 1151, 1153-54 (9th Cir. 1983) ("[I]n camera, ex parte review remains appropriate in certain FOIA cases, provided the preferred alternative to *in camera* review—government testimony and detailed affidavits—has first failed to provide a sufficient basis for decision.").

Weatherhead argues that the government never met its burden of identifying or describing any damage to national security that will result from release of the letter. We agree. In support of its decision to classify the withheld letter, the government submitted three decla-

³ *In camera* review may or may not be *ex parte*. *In camera* proceedings in FOIA cases involving classified documents are usually *ex parte* with even the counsel for the party seeking the documents denied the opportunity to be present. Hence courts' hesitancy to conduct *in camera* review in such cases. See *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983).

rations: that of Marshall R. Williams, which we will not discuss here, as it simply outlined the classification process; that of Peter M. Sheils, Acting Director of the State Department's Office of Freedom of Information, Privacy, and Classification Review; and that of Patrick Kennedy, Assistant Secretary for the Administration of the State Department. Mr. Sheils and Mr. Kennedy focus on two potential causes of damage to the national security: damage caused by the act of disclosing a letter between foreign governments, regardless of its particular contents, and damage caused because the letter concerns international extradition proceedings.

In his declaration, Mr. Sheils states, in pertinent part:

Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest. Disclosure of the document at issue in the circumstances of this case would clearly result in damage to relations between the United States and the United Kingdom and, therefore, to the national security in a clearly identifiable way.

. . . .

The one document withheld in this case clearly concerns the foreign relations or activities of the United States inasmuch as it is a communication from a British Home Office official to an official of the U.S. Department of Justice concerning the extradition from the U.K. to the U.S. of two individuals, apparently British nationals, to stand trial in the United States in a highly publicized case. Disclosure of the document by the Government of the United States, particularly in light of the refusal of the British Government to agree to its release, would inevitably result in damage to relations between the U.K. and the U.S.

The withheld document is a two-page letter dated July 28, 1994 from an official of the British Home Office to an official of the U.S. Department of Justice. Originally unclassified. Classified on October 27, 1995. Withheld in full. Exemption (b)(1).

The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

The district court concluded that Mr. Sheils' statements were of a general and conclusory nature and that his declaration failed to provide a particularized explanation of how disclosure of the letter would damage the relations between the United States and the United

Kingdom and therefore harm national security. We agree with the district court. Mr. Sheils merely confirms that the letter concerns extradition matters; he does not address how or why the letter's disclosure of extradition matters in particular will damage United States-United Kingdom relations. Mr. Sheils instead focuses on how disclosing a letter containing foreign government information will damage foreign relations, and, thus, national security, regardless of the letter's specific contents. We conclude that Mr. Sheils' explanation lacks the particularity "to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Wiener*, 943 F.2d at 977.

Although Mr. Kennedy's declaration is slightly more informative than Mr. Sheils' declaration, he still fails to explain how disclosure of the material in the withheld letter will harm national security:

[i]t is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. . . . Diplomatic confidentiality obtains . . . even with respect to information that may appear to be innocuous.

. . . .

Disclosure by the U.S. of information furnished by another government in violation of the confidentiality normally accorded such information may also make other governments hesitant to cooperate in matters of interest to the U.S. This includes U.S. law enforcement interests such as those involved in

the extradition case that is the subject of the document at issue in this litigation. Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here. Because of the sensitivity I cannot be more specific on the contents of the document and urge the court to conduct an *in camera* review.

Mr. Kennedy also points out that the British embassy stated that "U.K. authorities had already refused, 'on grounds of confidentiality,' to disclose the contents of the document." He concludes that:

In view of the expectation of the confidentiality of foreign government information and the explicit confirmation of that expectation by the British Embassy letter . . . , I have no doubt disclosure of the document by the U.S. government would harm the U.S. foreign relations and thereby damage national security.

Like Sheils, Kennedy focuses on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content "appear[s] to be innocuous." According to Kennedy, this harm occurs because all information exchanged between the U.S. and foreign governments is confidential. Mr. Kennedy also implies that disclosure would reduce international cooperation because of the sensitivity of the *category* of information

within which this letter belongs, namely "international extradition of fugitives."

In this appeal, the government presses the argument that Sheils and Kennedy primarily rely on in their declarations, that even if the letter's contents are not injurious, damage resulting solely from disclosing foreign government information meets the standards of the Executive Order. However, it is clear that *all* information exchanged between foreign governments is not exempt from FOIA disclosure, not even all information that another government prefers to keep confidential—otherwise the inquiry would end after the first three conditions for classification are satisfied. Congress could have exempted all information exchanged between the U.S. and foreign governments from FOIA requests, but chose instead to defer to the Executive Branch. Likewise, the Executive Branch could have shielded all documents involving foreign governments from FOIA disclosure in EO 12958. Instead, when it enacted EO 12958 in 1995, it chose to make it easier for the public to view materials from foreign governments by eliminating the presumption of harm found in the prior Executive Order, EO 12356 § 1.3(c), and requiring the U.S. government to identify the particular damage that would result from releasing the information.

The government next argues that if all foreign government information is not shielded from FOIA disclosure, then all foreign government information relating to international extradition is protected by the exemption, because its sensitive nature makes its release inherently damaging to the national security. While we do not preclude the possibility that the government might be able in some circumstance to

establish an inherently damaging category of information, we need not decide that question now, because the government did not meet its burden of establishing the justification for such a category in this case. Rather, it merely bandied about generalized fears of 'political sensitivity' relating to international extradition. In short, it failed to show that all documents falling within the category of international extraditions could reasonably be expected to result in damage to the national security if released. *Compare Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) (invalidating categorical rule forbidding disclosure of the names of lower-level FBI agents in all activities and requiring more particularized showing of damage). Furthermore, the government's conduct—seeking agreement from the British Government to release the letter, rather than assuming that the letter must be confidential—raises serious questions regarding the existence of such a category of withholdable information. Similarly, the response of the British Government to the State Department's request for concurrence in the release of the letter shows that all international extradition information is *not* confidential—the British Embassy in Washington wrote the State Department that "[t]he Home Office have advised that the normal line in cases like this is that all correspondence between governments is confidential unless papers have been formally requisitioned by the defence." Weatherhead, Croft's defense lawyer, formally "requisitioned" the letter, in common parlance, by making a formal FOIA request, and thereby doing exactly what the British Government required in order to overcome its restrictions regarding disclosure. Moreover, the British Embassy's response raises further issues. Given that exceptions to the confiden-

tiality of international extradition information do exist, it cannot be argued that the mere fact of disclosure of *any* such information is harmful, but only that (1) a disclosure of any such information under circumstances that do not qualify as an exception would cause injury, or (2) the disclosure of specific information would be injurious in all circumstances. This, in turn, calls into question the appropriate scope and nature of such exceptions and whether categories subject to exceptions can ever qualify for blanket exemptions.

Because the government has failed to establish either that the broad category of all foreign government information or the narrower category of international extradition information is confidential, we must next look to the individual document itself. Neither the government's briefs nor the declarations submitted in support of withholding the letter sufficiently explain the harm to national security that could result from its disclosure.

The government argues that its decision to classify the document should be given deference based on its affidavits and memoranda. Classification decisions are not given deference, however, until the government makes "an initial showing which would justify deference by the district court." *Rosenfeld v. United States Dept. of Justice*, 57 F.3d 803, 807 (9th Cir. 1995). As we have explained above, the government made no such showing in the documents it initially presented to the district court. Accordingly, the district court correctly held that the government failed to prove the withheld letter was exempt from FOIA disclosure prior to conducting its *in camera ex parte* review of the document.

Deference was given, however, to the government's perspective of the document when the district court (and later this court) reviewed the letter *in camera*. We recognize that "[i]n certain FOIA cases . . . , the government's public description of a document and the reasons for exemption may reveal the very information that the government claims is exempt from disclosure." *Doyle*, 722 F.2d at 556. Here, after it found the government failed to provide a sufficient basis for withholding the document in its briefs and declarations, the district court properly exercised its discretion to view the withheld letter *in camera*. After conducting *in camera* review of the letter, the district court stated that:

it knew without hesitation or reservation that the letter could not be released. The court is unable to say why for the same reason defendants were unable to say why. . . . [T]here is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

We disagree with the district court's conclusions. We have reviewed the letter *in camera*, and carefully considered its contents, including the "sensitivity, value, and utility" of the information contained therein. Having done so, we fail to comprehend how disclosing the letter at this time could cause "harm to the national defense or foreign relations of the United States." The letter is, to use Mr. Kennedy's term, "innocuous." Even after giving the act of classification the deference to which it is entitled, we are compelled to conclude that disclosure of the letter pursuant to Weatherhead's FOIA request could not reasonably "be expected to result in damage to the national security."

For the foregoing reasons, we reverse the district court's September 9, 1996 Order granting the government's motion for reconsideration and we reinstate its March 29, 1996 grant of summary judgment for Weatherhead.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, Dissenting:

The uncontradicted evidence before the district court established that the Home Office letter was sent by the British government to the U.S. Justice Department with an expectation of confidentiality and that damage to American national security would result from breaching that expectation. Those facts were proved by the uncontroverted declarations of two State Department officials, Patrick F. Kennedy and Peter M. Sheils, both of which were furnished in connection with the motion for summary judgment. Plaintiff offered no evidence to the contrary.

The Kennedy declaration is the most significant. Kennedy, an assistant Secretary of State, attested that it is longstanding custom and accepted practice in international relations to extend "diplomatic confidentiality" to information exchanged between governments such as the information involved here. Kennedy stated that upon receipt of plaintiff's FOIA request, the American government consulted the British Embassy to seek its views on the possible disclosure of the letter. The British Embassy responded that its government did, indeed, expect the letter to remain confidential. In fact, the Embassy stated that British authorities, on confidentiality grounds, previously refused a separate request for release of the letter made directly to the

British government. Thus, Kennedy's declaration not only was uncontroverted; it was corroborated.

Kennedy's declaration also stated that disclosure of the information in violation of accepted diplomatic confidentiality reasonably could be expected to damage relations between the U.S. and Britain, and between the U.S. and other governments, and he explained how: If the letter is released, Britain and other countries could well conclude that the U.S. cannot be trusted to protect confidential information. He stated that if diplomatic confidentiality is violated, it is likely that other nations will be less inclined to provide sensitive information or to cooperate in the international extradition of fugitives and in other matters of substantial interest to the United States. Kennedy attested that extraditions can be the subject of political sensitivity in the extraditing country. Such, he stated, was the case involving the two British women whose extraditions were the subject of the very document in question. Kennedy stated that he had "no doubt" but that disclosure of the letter would damage our foreign relations and national security.

Plaintiff offered no evidence to rebut any of this. He did not produce an affidavit from a diplomat, political scientist, academic, student of foreign relations, lawyer, journalist—anyone—to refute Kennedy's declaration. Nor am I aware of any other reason to treat Kennedy's sobering assessment with so little regard. The proper inquiry is not whether Kennedy's declaration could have contained more, but only whether it contained enough. In my view, it did.

Having examined the letter *in camera* and having considered its contents "including the 'sensitivity, value, and utility' of the information contained therein,"

the majority says that it "fail[s] to comprehend how disclosing the letter at this time could cause harm to the national defense or foreign relations of the United States." The district judge, on the other hand, "knew without hesitation or reservation that the letter could not be released" when he saw it *in camera*. Either way, we judges are outside of our area of expertise here. It's one thing to examine a document *in camera* for the existence of facts—to see, for example, whether it deals with attorney-client communications or other privileged matter. See *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089 (9th Cir. 1997). It's a whole different kettle of fish to do what the majority has presumed to do here, to make its own evaluation of both the sensitivity of a classified document and the damage to national security that might be caused by disclosure. With all due respect, I suggest that in matters of national defense and foreign policy, the court should be very leery of substituting its own geopolitical judgment for that of career diplomats whose assessments have not been refuted in any way.

There is no basis in the record to conclude otherwise than that the letter is "foreign government information" as defined by Section 1.1(d) of the Executive Order, that its release would cause damage to the national security in the manner described by Kennedy, and that therefore it is exempt from disclosure. I would affirm the district court's grant of summary judgment for the government and therefore, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[FILED: Sept. 9, 1996]

ORDER

BEFORE THE COURT are defendants' Motion for Reconsideration or in the alternative to File Document In Camera, or in the alternative to Stay Pending Appeal. Plaintiff is represented by Gregory J. Workland; defendants by Sanjay Bhambhani and Assistant United States Attorney James R. Shively. The matter was argued on June 3, 1996. This Order will memorialize the Court's ruling.

Background

By Order entered March 29, 1996, the Court granted plaintiff's motion for summary judgment in this FOIA action. A timely motion for reconsideration followed. The factual background which gave rise to this litigation is set out in the Order under reconsideration and need not be repeated here. By way of supplementation, defendants' motion seeks in the alternative to submit

nonpublic affidavits or the requested material itself for in camera review. During oral argument heard telephonically on June 3, 1996, the Court declined to conduct in camera review. During a subsequent conference held on June 24, 1996, the Court reluctantly granted the second prong of this alternative relief and has now reviewed the requested document.

Analysis

Reconsideration pursuant to FRCP 59(e) is appropriate when a court:

- (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. There may also be other, highly unusual, circumstances warranting reconsideration.

School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2742 (1994).

(1) *Newly discovered evidence*: Patrick F. Kennedy, whose declaration is appended to defendants' brief, is the Assistant Secretary for Administration for DOS. Attached to his declaration is the letter of inquiry sent by DOS to the British Embassy and the Embassy's response. This is new evidence so far as plaintiff and the Court are concerned, but not newly discovered evidence from defendants' perspective. The Kennedy Declaration is slightly more informative than is the Sheils Declaration, but still reflects a "trust me" aura. The letter of inquiry cuts against defendants' position. It suggests that DOS intended to comply with the FOIA request and would have but for U.K.'s opposition

("Before complying with this request, we would appreciate the concurrence of your government in the release of the document"). This in turn suggests that as late as August 4, 1995 when the letter was drafted, DOS did not envision disclosure as adversely affecting the national interest.

(2) *Clear error*: Defendants are not critical of the Court's analytical framework and appear to agree that the sequential assessment made was a proper inquiry. They do contend that: (a) the agency determination of harm was given inadequate deference; (b) the letter should have been found to be foreign government information; (c) when the Court rejected plaintiff's contentions that protracted delay in the administrative process and the failure to cite the executive order relied upon constituted a basis for directing disclosure, the inquiry should have ended; (d) if *Vaughn* materials are found deficient, the proper remedy is to allow the agency to supplement; and (e) former EO 12356 should govern because that was the executive order in effect when the letter was written.

(a) *Deference*: The older case law relied upon by defendants emanating from the cold war era tends to accord great deference to agency determinations involving national security. *Taylor v. Dept. of Army*, 684 F.2d 99, 109 (D.C. Cir. 1982) ("utmost deference"); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("substantial weight"). In the Ninth Circuit, classification decisions are given deference (*Wiener v. F.B.I.*, 943 F.2d 972, 980 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212, 112 S. Ct. 3013 (1992)), but not until the agency makes "an initial showing which would justify deference by the district court." *Rosenfeld v. U.S. Dept. of Justice*,

57 F.3d 803, 807 (9th Cir. 1995), *cert. dismiss'd*, ___ U.S. ___, 116 S. Ct. 833 (1996). This is not a case such as *Taylor* which involved disclosure of "military secrets [and] military planning," nor a case such as *Halperin* which involved disclosure of the identity of CIA operatives. The *Vaughn* materials submitted here fail to communicate the significance of the letter's content other than to note it involves extradition matters "with particular reference to the U.S.-U.K. extradition agreement."

Moreover, deference is given only because of the agency's knowledge and experience. *Taylor, supra*, 684 F.2d at 109. There is a distinction to be drawn between the situation where an agency sets out its views on factual matters and where, as does the Sheils Declaration in large measure, it construes the law as applied to the facts. The interpretation of an executive order is a judicial function. Deferring to an agency in this context would be an abdication of that function.

As will appear further in Section 4, however, the Court has accorded defendants' declarations deference; enough to warrant granting the motion for reconsideration

(b) *Foreign government information*: This is a red herring. Even if the letter qualified as foreign government information, it would not help defendants. The Court assumed for purposes of disposition that § 1.2(a)(3) of Executive Order [EO] 12958 was met under the foreign relations prong defined at § 1.5(d) ("Based on the assumption that §1.5(d) applies, § 1.2(a)(3) has been satisfied and so has § 552(b)(1)(A)"). It does not matter which of the seven § 1.5 prongs is satisfied so long as one of them is. Disposition did not

rest on a failure to meet § 1.2(a)(3), but rather the harm prong set out in § 1.2(a)(4).

Even if it mattered, defendants' current argument highlights its fallacy. According to the defense, all materials generated by a foreign government are confidential unless "an understanding exists between the governments involved that the information may be disclosed." (Ct. Rec. 17, Kennedy Declaration at ¶ 4). Also according to the defense, the release of any confidential material always causes harm because (confirming suspicions articulated in the Order under reconsideration), it is the act of producing rather than the content of production which causes harm. According to Mr. Kennedy, this is true even if the content "appear[s] to be innocuous," a term which by definition means "harmless." (Ct. Rec. 18, Kennedy Declaration at ¶ 4.)

There may be historical practices and protocols in diplomatic circles supportive of defendants' position, and probably are. In recognition of that history, Congress could have shielded all materials either generated or held by DOS from FOIA disclosure, but chose instead to defer to the Executive Branch. The Executive Branch could have shielded all materials either generated or held by DOS from FOIA disclosure, and for all practical purposes did so in 1982 when EO 12356 was signed. In 1995, the current administration eliminated the presumption of harm found in former EO 12356 § 1.3(c) and now requires a showing of harm on a case-by-case basis. EO 12958 § 1.2(a)(4). This is a major shift in policy. Defendants might not view this evolution as prudent policy, but the answer is to direct their concerns to the President, not to ask courts to rewrite an executive order by inserting language the President pointedly deleted.

(c) *Scope of inquiry*: The Court exceeded the scope of the inquiry as framed by plaintiff, but not the scope of the case as developed by defendants. In these sui generis FOIA actions, a plaintiff may have little or no idea what the basis for withholding is until the agency responds. That is what occurred here.

(d) *Supplementation*: Defendants apparently believe there is no end to their right to supplement ad infinitum. FOIA actions are unique in many respects, and it is true that decisions on occasion sanction remand as a remedy (e.g., *Wiener, supra*), but as noted in the Order under reconsideration:

[U]nlike the fact patterns of most of the authorities cited herein, this is a very modest controversy. It involves one letter two pages long. No reason appears why the declarations now on file could not have been drafted with the specificity and particularity required by [*Wiener*].

(e) *Applicability of former 12356*: In their reply, defendants contend that former EO 12356 should apply because it was effective when the letter was generated. The first problem with this premise is that it runs afoul of the rule that the governing executive order is the one in effect when the classification decision is made. *Afshar v. Department of State*, 702 F.2d 1125, 1135-37 (D.C. Cir. 1983). The second problem is that defendants had it within their power to apply former EO 12356. Plaintiff's request was made on November 29, 1994. EO 12958 was signed five months later on April 17, 1995. It did not become effective until 180 days later on October 14, 1995. Defendants did not seek input from U.K. until August 4, 1995, and U.K. did not respond until October 18, 1995, four days after the effective date of EO 12958. Had the classification

decision been made with reasonable dispatch, former EO 12356 would have applied, and given the presumption of harm contained in § 1.3(c), the outcome of this action may have been quite different. To apply former EO 12356 at this juncture would be to rewrite the history of why, when and how defendants processed the request and arrived at the classification decision. The protracted delay standing alone has no bearing on the outcome, but the delay carries with it consequences and no reason appears why the Court should relieve defendants of those consequences.

(3) *New law*: Other than authorities directed to entry of a stay pending appeal, no new law is cited. Defendants apparently think *Schiffer v. F.B.I.*, 78 F.3d 1405 (9th Cir. 1996) is new, because they have attached a copy to their brief, but *Schiffer* is a conventional application of *Wiener, supra*.

(4) *Other, highly unusual, circumstances warranting reconsideration*: As previously noted, the Court accepted the letter for in camera review reluctantly because the procedure does not serve the adversarial process and there was no guarantee it would inform the Court. In deference to defendants' announced concerns in their declarations, however, the Court concluded that these risks paled beside the danger that highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself. That proved to be the case. When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and there is no portion of it

which could be disclosed without simultaneously disclosing injurious materials.

In signing the 1995 executive order, the President doubtless thought it in the public interest to cast aside veils of secrecy not truly justified by the facts. This major shift in policy is not without its costs. Now that the presumption of harm no longer exists, and each case must stand on its own facts, the result which obtained here may well be repeated in district courts across the country. FOIA actions are none too adversarial to begin with, and this one ended with the adversarial process in tatters. A litigant in this situation is left only with the solace of knowing that not only do two high ranking DOS officers believe disclosure of the subject material injurious to the national interest, but so does an independent federal judge. This may be some comfort, but probably not much.

IT IS HEREBY ORDERED:

Defendant's Motions for Reconsideration or in the alternative to File Document In Camera, or in the alternative to Stay Pending Appeal (Ct. Rec. 16) are GRANTED in part and DENIED in part as moot as provided in the text.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

Dated this 9th day of September 1996.

/s/ FRED VAN SICKLE
FRED VAN SICKLE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL. DEFENDANTS

[Filed: Mar. 29, 1996]

ORDER

In this matter, plaintiff is represented by Gregory Workland; defendants are represented by Assistant United States Attorney James R. Shivley. Plaintiff Weatherhead brings this motion for summary judgment pursuant to 5 U.S.C. § 552 seeking an order to compel the defendants to cease withholding a document pursuant to the Freedom of Information Act [FOIA]. Jurisdiction is properly in this Court. The motion was argued on March 6 and 13, 1996 and taken under advisement. This Order will memorialize the Court's ruling.

Background

On November 29, 1994, plaintiff requested a copy of a letter sent by the British Home Office to George

Procter of the United States Department of Justice [DOJ] dated July 28, 1994 relating to the extradition and prosecution of two women, Sally Croft and Susan Hagan. (Exhibits A & B to plaintiff's complaint). Separate requests were directed to DOJ and the Department of State [DOS]. On May 4, 1995, DOS advised that no responsive document could be located. DOJ did locate the letter and informed plaintiff that because it was created by a foreign government, it would be referred to DOS for review to determine whether it could be released. Correspondence and administrative appeals followed throughout the summer. On September 12, 1995, DOJ advised the matter was still under consideration. This action was commenced on November 17, 1995. On December 11, 1995, DOS declined to release the letter and asserted for the first time an exemption under FOIA. DOS informed plaintiff that the letter was now classified because the British Home Office did not wish the letter released. The same information was later provided plaintiff by DOJ.

Analysis

Initially, defendants correctly point out that the protracted delay in responding to plaintiff's request is not a basis for compelling disclosure, but rather a basis for plaintiff to demonstrate there has been an exhaustion of the necessary administrative remedies and allows plaintiff to bring this action in the United States District Court.

Defendants contend the information sought is exempt from disclosure under 5 U.S.C. § 552(b)(1) which provides:

This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]

The Executive Order [EO] applicable to this case is the one in effect at the time of classification on October 27, 1995; EO 12958 (signed April 17, 1995 and effective 180 days later). See, e.g., *Afshar v. Department of State*, 702 F.2d 1125, 1135-37 (D.C. Cir. 1983) (EO in effect at time of classification controls).

Defendants have submitted "Vaughn affidavits" containing the declarations of Peter M. Sheils and Marshall R. Williams.¹ The reference to "Vaughn affidavits" comes from *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564 (1974) which is the seminal case which designed the affidavit system now universally recognized as appropriate and necessary in FOIA actions. The mechanics of the process are that the agency prepares a "Vaughn index" "identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Wiener v. F.B.I.*, 943 F.2d 972, 977

¹ Only Mr. Sheils' declaration is germane to these proceedings. Mr. Williams' declaration does not attempt to support the classification decision and merely chronicles the flow path as the subject request was processed through administrative channels.

(9th Cir. 1991), *cert. denied*, 505 U.S. 1212, 112 S. Ct. 3013 (1992). A court then reviews the factual representations in light of the relevant classification standards.

The current EO at § 1.2 provides for the following standards:

(a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States government;

(3) the information falls within one or more of the categories of information listed in § 1.5 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

As to § 1.2(a)(1), the original classification authority is classifying the information. The Court believes that DOS is the original classification authority and is classifying the information.

As to § 1.2(a)(2), the information is under the control of the United States government.

Section § 1.2(a)(3) involves application of several subsections of § 1.5. Defendants contend that § 1.5(b) "foreign government information" applies here. The definition of foreign government information is found at § 1.1(d). Foreign government information means "(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, *with the expectation that the information, the source of the information, or both, are to be held in confidence* [emphasis added][.]"

The language "with the expectation" should be read as referring to the time the information was provided and not after the fact. "With," as used in this context, means "accompanied by, attended by." Webster's New World Dictionary 1534 (3rd College ed.). "Expectation" means "a thing looked forward to." *Id.* at 478. When a person performs an act "with expectation," he has a present belief or desire that some anticipated result will obtain in the future. Thus, the expectation that the information would be held in confidence relates to the time frame of July 28, 1994, being the date the letter was sent by the British Home Office. There is no showing in this record of a contemporaneous expectation of confidentiality with respect to the letter; only that upon being later approached by DOS, Great Britain was "unable to agree to its release."

Contrary to the government's position during oral argument, there has been no showing that the prior EO in effect at the time the letter was sent (EO 12356) would allow a foreign government to believe that information it provided to the United States would be presumptively treated as confidential.

Defendants further contend that the declaration of Mr. Sheils at paragraph 13 applies. The first sentence reads "There is a general understanding among governments that confidentiality is normally to be accorded exchanges between governments." Defendants contend that this general understanding applies and that the information was thus provided with an understanding of confidentiality.

This rationale does not logically follow. The Court is aware that foreign governments are sophisticated in understanding the law and would appreciate that information provided by a foreign government is subject to disclosure under FOIA unless it satisfies the exemption requirements of § 1.2(a).

If such a rationale applies, *i.e.*, the general understanding among governments that confidentiality is normally to be accorded exchanges between governments, then all such exchanges would be confidential and the definition of "foreign government information" in EO § 1.1(d) would have no meaning and serve no purpose under FOIA. The Court does not believe that § 1.1(d) is or was intended to be of no import or to be meaningless surplusage.

Further, § 1.1(d)(3) seeks to utilize provisions of the previous EO by providing that "information received and treated as 'Foreign Government Information' under the terms of a predecessor order" also constitutes foreign government information under the current EO. The prior EO at § 6.1(d)(1) defines the term as "information provided by a foreign government . . . with the expectation, expressed or implied, that the information, the source, or both, are to be held in confidence." This subsection adds nothing to the current EO except the words "expressed or implied." Even if the current

EO added anything to the definition, § 1.1(d)(3) requires that the foreign government information must be treated as confidential to be included under the current EO. Neither DOJ nor DOS treated the letter as confidential at the time of receipt. Neither agency classified the letter until nearly a year after the subject FOIA request. Neither asserted an exemption until more than a year after the request, and then only at the request of Great Britain.

The result of this review is that the classification is not proper under EO § 1.5(b) because the July 28, 1994 letter does not fall within the definition of "foreign government information." If not properly classified under § 1.5(b), neither is it properly classified pursuant to 552(b)(1)(A).

Defendants also contend that EO § 1.5(d) applies. That section provides "Information may not be considered for classification unless it concerns: . . . (d) foreign relations or foreign activities of the United States including confidential sources[.]" While "foreign relations" is not defined in the EO, it would appear that the fundamental function of DOS is to oversee foreign relations and thus it would be assumed that the letter does meet the definition of involving foreign relations. Based on the assumption that § 1.5(d) applies, § 1.2(a)(3) has been satisfied and so has § 552(b)(1)(A).

The EO requires that the provisions of § 1.2(a)(4) also be met. That subsection is satisfied when "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage." The EO in § 1.1(1) defines damage to national security as "harm to the

national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information."

Wiener, supra, requires "a particularized explanation of how disclosure of a particular document would damage the interest protected by the claimed exemption." 943 F.2d at 977. The Court goes on to indicate that the purpose of requiring the showing is to "restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Id.* at 977-78. "Particularized explanation" means that "[e]ffective advocacy is possible only if the requester knows the precise basis for the nondisclosure." *Id.* at 979. "The agency 'must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Bay Area Lawyers Alliance v. Dept. of State*, 818 F. Supp. 1291, 1296 (N.D. Cal. 1992) (emphasis original, citation omitted).

Here, the Court must apply the requirements of *Wiener* and *Bay Area Lawyers Alliance* to the *Vaughn* declarations. Classification decisions are treated with a measure of deference, but not until the agency makes "an initial showing which would justify deference by the district court." *Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803, 807 (9th Cir. 1995), *cert. dismissed*, ___ U.S. ___, 116 S. Ct. 833 (1996). At the same time, exemptions are construed narrowly and the burden is on the agency to establish the claim of exemption. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S. Ct. 471, 475 (1989); *Church of Scientology Intern. v. U.S. Dept. of Justice*, 30 F.3d 224, 228 (1st Cir. 1994); *Bay*

Area Lawyers Alliance, supra, 818 F. Supp. at 1295). In terms of procedure the difficulty in these circumstances is set out in *Jones v. F.B.I.*, 41 F.3d 238 (6th Cir. 1994):

FOIA cases typically come up on appeal in this fashion, based on the defendant agency's *Vaughn* affidavits and before the plaintiff has had a chance to engage in discovery. This is a peculiar posture, difficult for our adversarial system to handle. The problem goes to the very nature of these actions as petitions for the release of documents. Where material has been withheld by the government agency, the plaintiff must argue that the withholding goes beyond that allowed by the statute. But the plaintiff is handicapped in this endeavor by the fact that only the agency truly knows the content of the withheld material. Except in cases in which the court takes the entire set of responsive documents *in camera*, even the court does not know.

Id. at 242 (citations omitted).

Thus, in this case, the application of the above-described standards must be viewed in light of the *Vaughn* declarations. Mr. Sheils, in his declaration at paragraph 14, states:

Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives

would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest. Disclosure of the document at issue in the circumstances of this case would clearly result in damage to relations between the United States and the United Kingdom and, therefore, to the national security in a clearly identifiable way.

The declaration of Mr. Sheils goes on to say at paragraphs 16 and 17:

16. The one document withheld in this case clearly concerns the foreign relations or activities of the United States inasmuch as it is a communication from a British Home Office official to an official of the U.S. Department of Justice concerning the extradition from the U.K. to the U.S. of two individuals, apparently British nationals, to stand trial in the United States in a highly publicized case. Disclosure of the document by the Government of the United States, particularly in light of the refusal of the British Government to agree to its release, would inevitably result in damage to relations between the U.K. and the U.S.

17. The withheld document is a two-page letter dated July 28, 1994 from an official of the British Home Office to an official of the U.S. Department of Justice. Originally unclassified. Classified on October 27, 1995. Withheld in full. Exemption (b)(1).

The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The

letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

The issue is whether the information provided in the *Vaughn* declarations meets the requirement of a particularized explanation of how disclosure of this particular document would damage the interest protected by the claimed exemption. While there are no specific rules or concrete standards to assist this Court other than those indicated in *Wiener*, this Court determines that the information provided in the several sections of the declaration of Mr. Sheils is of a general and conclusory nature and not a particularized explanation of how disclosure of this letter would damage the relations between the United States and the United Kingdom and therefore national security or how disclosure of this letter in light of the refusal of the British Government to agree to its release would inevitably result in damage to relations between the United Kingdom and the United States. Simply put, the declaration does not "afford the requester an opportunity to intelligently advocate release of the withheld documents and . . . afford the court an opportunity to intelligently judge the contest." *Wiener, supra*, 943 F.2d at 979; *accord, Church of Scientology, supra*, 30 F.3d at 231.

In essence, what defendants are saying is that it is the act of disclosure itself, not disclosure of the *contents*, which would harm national security. This line of reasoning is inconsistent with EO § 1.1(1) which defines damage to the national security as "harm to the na-

tional defense or foreign relations of the United States from the unauthorized disclosure of information, *to include the sensitivity, value, and utility of that information* [emphasis added]." Clearly, these criteria place the focus on the information disclosed, not the act of disclosing. If defendants' rationale were carried forward, if any foreign government did not want a document disclosed, its request would automatically supersede FOIA thereby defeating the public policy of providing properly requested information.

Finally, the declarations do not adequately address segregability. Mr. Sheils' declaration merely states that the letter is being "withheld in full" because "no meaningful segregation of information from the withheld material can be made without disclosing information requiring protection." "This is entirely insufficient." *Bay Area Lawyers Alliance, supra*, 818 F. Supp. at 1300.

[E]ven if part of a document is FOIA exempt, the agency still must disclose any portions which are not exempt—i.e., all "segregable" information—and must address in its *Vaughn* index why the remaining information is not segregable. The district court must make specific factual findings on the issue of segregability to establish that the required *de novo* review of the agency's withholding decision has in fact taken place. The Court may not "simply approve the withholding of an entire document without entering a finding on segregability. . . ."

Id. at 1296 (citations omitted).

The Court cannot make the required findings because the record reflects no facts from which findings could be developed.

Defendants urge that summary judgment is inappropriate because a material dispute exists over Great Britain's expectation of confidentiality. There may be a dispute, but it is not material. The Court has assumed for purposes of disposition that the letter falls within EO § 1.5(d) as "foreign relations material" thereby satisfying § 552(b)(1)(A). Whether it also falls within § 1.5(b) as "foreign government information" is thus not material to the outcome because whether it does or not, § 552(b)(1)(B) is not satisfied.

Defendants also urge that summary judgment is inappropriate because material disputes exist over the nature and magnitude of harm as recited in Mr. Sheils' declaration at paragraphs 14 and 16. Initially, it is not clear how this case could proceed to discovery and trial. If defendants do not wish to release the letter, the significance of which does not appear in the record, it seems most improbable they would be willing to open up their inner departmental workings so the system could test why the exemption was claimed and how that decision was made.

However, the interesting possibility of proceeding to trial need not be addressed because the Court concludes there are no genuine issues of material fact. The information in the *Vaughn* declarations is undisputed in terms of the operative (as opposed to ultimate) facts. The Court may rule as a matter of law in this case. Moreover, unlike the fact patterns of most of the authorities cited herein, this is a very modest controversy. It involves one letter two pages long. No reason appears why the declarations now on file could not have been drafted with the specificity and particularity required by that decision. The burden of validating the

claimed exemption is on defendants. *John Doe Agency*, 493 U.S. at 152, 110 S. Ct. at 475.

It is the determination of the Court that the exemption provision of 5 U.S.C. § 552(b)(1)(B) has not been shown to apply and therefore plaintiff's Motion for Summary Judgment (Ct. Rec. 4) requiring disclosure of the July 28, 1994 letter would be **GRANTED**. If any particular form of Order is required to effectuate this ruling, plaintiff may submit a proposed Order in due course.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order, enter judgment thereon, furnish copies to counsel and close this file.

DATED this 29 day of March, 1996.

/s/ FRED VAN SICKLE
FRED VAN SICKLE
United States District Judge

APPENDIX D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

**UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, DEFENDANT**

[Filed: Apr. 12, 1996]

JUDGMENT IN A CIVIL CASE

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that it is the determination of the Court that the exemption provision of 5 USC 552 (b)(1)(B) has not been shown to apply and therefore plaintiff's motion for summary judgment (Ct. Rec. 4) requiring disclosure of the July 28, 1994 letter be **GRANTED**. If any particular form of Order is required to effectuate this ruling, plaintiff may submit a proposed Order in due course.

Dated: April 12, 1996 **JAMES R. LARSEN, Clerk**

by: **ANNIE SMITH**
ANNIE SMITH, Deputy

APPENDIX E**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 96-36260
D.C. No. CV-95-00519-FVS

LES WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF JUSTICE; UNITED
STATES DEPARTMENT OF STATE,
DEFENDANTS-APPELLEES

[Filed: Feb. 26, 1999]

ORDER

Before: HUG, Chief Judge, REINHARDT and SILVERMAN, Circuit Judges.

The panel has voted to deny Appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-

recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 96-36260
D.C. No. CV-95-00519-FVS

LES WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF JUSTICE; UNITED
STATES DEPARTMENT OF STATE,
DEFENDANTS-APPELLEES

[Filed: Mar. 9, 1999]

AMENDED ORDER

Before: HUG, Chief Judge, REINHARDT and SILVER-
MAN, Circuit Judges.

Chief Judge Hug and Judge Reinhardt voted to deny Appellees' petition for rehearing and to reject the suggestion for rehearing en banc. Judge Silverman voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-

recused active judges in favor of en banc consideration.
Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil Action No. 95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF PETER M. SHEILS

I, Peter M. Sheils, declare and state as follows:

1. I am the Department of State's Acting Information and Privacy Coordinator and the Acting Director of the Department's Office of Freedom of Information, Privacy, and Classification Review (FPC). In these capacities, I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. §552, the Privacy Act, 5 U.S.C. §552a, and other applicable records access provisions. I have been in the employ of the Department of State since 1975, and have served in a variety of positions with the Department's Information Access Program for most of my tenure with the Department. I am authorized to classify to the Top Secret level and to downgrade and to declassify national security information pursuant to Executive Order (E.O.) 12958 and Department of State

regulations set forth in 22 CFR 9.14. I make the following statements based upon my personal knowledge, which is in turn based on a personal review of the document withheld, and upon information furnished to me in the course of my official duties.

2. FPC is responsible for the coordination and processing of external requests for Department records, including the receipt, acknowledgment, retrieval and classification review of records determined to be responsive to such requests. External requests include those that have been made by the general public, members of Congress, and other government agencies, and those that have been made pursuant to judicial processes, such as subpoenas, court orders, and discovery requests.

3. I have personal knowledge of the efforts of Department personnel to review and process one document, consisting of two pages, referred to the Department of State in connection with a Freedom of Information Act request dated November 29, 1994, submitted by plaintiff to the Department of Justice ("DOJ"). The actions taken by the Department of State in connection with the processing of this referral are set forth below.

4. By memorandum dated May 17, 1995 (Exhibit 1), DOJ referred one document, consisting of two pages, to the Department of State for processing and direct response to plaintiff. The Department of State conducted a review of this document, and by letter dated December 11, 1995 (Exhibit 2), advised plaintiff that the document was exempt from disclosure pursuant to exemption (b)(1) of the FOIA.

5. In applying the (b)(1) exemption to the single denied document, and after a line-by-line review of the document, I have determined that no meaningful segregation of information from the withheld material can be made without disclosing information requiring protection. This declaration includes the justification for asserting the (b)(1) exemption to the withheld information, and a document description which addresses the withheld document.

FOIA EXEMPTIONS CLAIMED

Exemption (b)(1)—Classified Information

6. 5 U.S.C. Section 552 (b)(1) states that the FOIA does not apply to matters that are:

(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(B) are in fact properly classified pursuant to such an Executive order.

The information to which the (b)(1) exemption has been applied in this case is required to be kept secret because it is foreign government information and in the interest of foreign policy pursuant to Executive Order 12958, and is properly classified pursuant to that Executive Order. This information is therefore exempt from disclosure under subsection (b)(1) of the FOIA.

7. The one document withheld from the plaintiff is classified "Confidential". Section 1.3(a)(3) of E.O. 12958 states that the designation "Confidential" shall be applied to information, the unauthorized disclosure of

which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe. "Damage to the national security" is defined in Section 1.1(1) as meaning "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information."

8. The withheld document has been reviewed by an official with original classification and declassification authority. The document comes within two particular categories enumerated in E.O. 12958: "foreign government information" [Section 1.5(b)]; and "foreign relations or foreign activities of the United States" [Section 1.5(d)]. With respect to the document withheld, an original classification authority has determined that "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," consistent with the provision of section 1.2(4) of E.O. 12958.

9. Procedurally, the document to which the (b)(1) exemption has been applied was classified by the Department of State under Executive Order 12958. The document was carefully reviewed to ensure that it was properly marked in accordance with that Order.

10. Substantively, the information with respect to which the (b)(1) exemption has been applied meets the classification criteria of E.O. 12958. Section 1.5 of the Executive Order states in pertinent part that "Information may not be considered for classification unless it concerns: . . . (b) foreign government information;"

and "(d) foreign relations or foreign activities of the United States"

Section 1.5(b)—Foreign Government Information

11. Section 1.5(b) of E.O. 12958 provides, in pertinent part, that:

Information may not be considered for classification unless it concerns: . . .

(b) foreign government information

12. Section 1.1(d) states, in pertinent part, that "Foreign Government Information" means: (1) information provided to the United States Government by a foreign government . . . with the expectation that the information, the source of the information, or both, are to be held in confidence."

13. There is a general understanding among governments that confidentiality is normally to be accorded exchanges between governments. The document addressed in this declaration is a letter from an official of the British Home Office to an official of the U.S. Department of Justice. That the information in the document was intended by the U.K. Government to be held in confidence is confirmed by the British response to a Department of State inquiry regarding possible release to plaintiff. The British Foreign and Commonwealth Office responded, through the British Embassy in Washington, that it was "*unable to agree to its release*" (emphasis in the original). Consequently, the Department of State classified the document Confidential to protect its confidential character as foreign government information.

14. Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest. Disclosure of the document at issue in the circumstances of this case would clearly result in damage to relations between the United States and the United Kingdom and, therefore, to the national security in a clearly identifiable way.

Section 1.5(d)—Foreign Relations or Foreign Activities of the United States

15. Section 1.5 of E.O. 12958 provides, in pertinent part, that:

Information may not be considered for classification unless it concerns: . . .

(d) foreign relations or foreign activities of the United States; . . .

16. The one document withheld in this case clearly concerns the foreign relations or activities of the United States inasmuch as it is a communication from a British Home Office official to an official of the U.S. Department of Justice concerning the extradition from the

U.K. to the U.S. of two individuals, apparently British nationals, to stand trial in the United States in a highly publicized case. Disclosure of the document by the Government of the United States, particularly in light of the refusal of the British Government to agree to its release, would inevitably result in damage to relations between the U.K. and the U.S.

DOCUMENT DESCRIPTION FOR WITHHELD
DOCUMENT

17. The withheld document is a two-page letter dated July 28, 1994 from an official of the British Home Office to an official of the U.S. Department of Justice. Originally unclassified. Classified on October 27, 1995. Withheld in full. Exemption (b)(1).

The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 5th day of March, 1996.

/s/ PETER M. SHEILS
PETER M. SHEILS

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil Action No. 95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

DECLARATION OF PATRICK F. KENNEDY

I, Patrick F. Kennedy, declare and state as follows:

1. I am the Department of State's Assistant Secretary for Administration. In this capacity, I am the Department official responsible for supervising the Department's Office of Freedom of Information, Privacy, and Classification Review (FPC) and for administration of the agency's program under the Executive Order on Classification of National Security Information (E.O. 12958). I have been in the employ of the Department of State since 1972. I make the following statement based upon my personal review of the document withheld, and upon information furnished to me in the course of my official duties.

2. I incorporate by reference the declaration dated March 5, 1996 of Peter M. Sheils, Acting Director, Office of Freedom of Information, Privacy, and Classification Review.

3. I make this supplemental declaration in support of the motion of the United States for reconsideration of the order of the District Court dated March 29, 1996 that a document withheld by the Department of State under the Freedom of Information Act should be disclosed to plaintiff. The Department of State urges that the decision of the District Court be reconsidered because of the damage to U.S. foreign relations that could result from compliance with the District Court's disclosure order.

4. It is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. Such confidentiality is presumptively accorded with respect to information unless an understanding exists between the governments involved that the information may be disclosed. Diplomatic confidentiality obtains even between governments that are hostile to each other and even with respect to information that may appear to be innocuous. It also applies whether or not the foreign government document was marked with some security classification at the time by the sending or receiving government.

5. In keeping with the rule of diplomatic confidentiality, the Department of State normally withholds documents containing information that originated with a foreign government from public disclosure, including in response to a Freedom of Information Act (FOIA), Privacy Act, discovery, or other type of disclosure request usually without consultation with that government. When a request for such information

is made under the FOIA or similar process, the information, based on the subject matter and if not previously classified, is classified by the Department without consultation with the government concerned. In certain cases, such as this one, the Department may seek the views of the foreign government and then may classify the document. We expect and receive similar treatment from foreign governments. The information in this document is of a nature that it is evident that confidentiality was expected at the time it was sent and its contents cannot be described in greater detail without revealing the sensitivity of the document and I therefore urge the court to conduct an *in camera* review.

6. Disclosure of the information in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government. Disclosure of information considered confidential in diplomatic communications, voluntarily or in compliance with a court order, may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them. This, in turn, would damage our relations with affected governments. It would also likely make other governments reluctant to provide sensitive information to the U.S. in diplomatic communications, thereby damaging our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role.

7. Disclosure by the U.S. of information furnished by another government in violation of the confidentiality

normally accorded such information may also make other governments hesitant to cooperate in matters of interest to the U.S. This includes U.S. law enforcement interests such as those involved in the extradition case that is the subject of the document at issue in this litigation. Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here. Because of the sensitivity I cannot be more specific on the contents of the document and urge the court to conduct an *in camera* review.

8. Although, the Department normally classifies and withholds foreign government information in response to FOIA and other disclosure requests without consulting the government that originated the information, in some cases, the foreign government is consulted regarding possible disclosure. In this case, after receiving the FOIA request from the plaintiff, the Department sent a letter (Exhibit 1) dated August 4, 1995 to the British Embassy in Washington seeking the views of the U.K. authorities on possible disclosure, in whole or in part, of the letter from the British Home Office to the U.S. Department of Justice.

9. The British Embassy replied by letter (Exhibit 2) dated October 18, 1995, noting the expectation of confidentiality of such documents and stating that the Government of the United Kingdom was unable to

agree to disclosure, in whole or in part. The Embassy noted, in particular, that U.K. authorities had already refused, "on the grounds of confidentiality," to disclose the contents of the document in response to a request by representatives of the defendants in the extradition case. In view of the British Embassy's reply, it is clear that the British authorities expected at the time the Home Office sent the letter to the Department of Justice and continue to expect that the document would be protected from disclosure in accordance with accepted practice.

10. In view of the expectation of the confidentiality of foreign government information and the explicit confirmation of that expectation by the British Embassy letter at Exhibit 2, I have no doubt disclosure of the document by the U.S. government would harm the U.S. foreign relations and thereby damage national security. For this reason, the document is currently and properly classified under E.O. 12958 and is exempt from disclosure under exemption (b)(1) of the FOIA.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 11th of April, 1996

/s/ PATRICK F. KENNEDY
PATRICK F. KENNEDY

APPENDIX I

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36260

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF STROBE TALBOTT

I, STROBE TALBOTT, declare as follows:

1. I am the Acting Secretary of State of the United States. In this capacity I am responsible for the formulation and implementation of the foreign policy and conduct of the foreign relations of the United States, subject to the direction of the President. I am familiar with the foreign policy issues that relate to the United Kingdom, and with the conduct of our foreign relations in general.

2. Pursuant to the authority vested in me as Secretary of State, I make this declaration in support of the government's motion for a stay of the mandate and to reaffirm the national security exemption over the British Government document that is the subject of this case. I am making this declaration and the following statements based upon the information conveyed to me by my advisers in the course of their official duties and

upon my own personal judgment that the nature of the information in question merits an assertion of this exemption.

3. Great Britain is perhaps our staunchest and certainly one of our most important allies. On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation, trade disputes, matters before the United Nations Security Council, human rights and law enforcement. In many of these areas we have engaged in diplomatic dialogue with officials of the British in the course of which information was exchanged with an expectation of confidentiality. Such confidential diplomatic dialogue is essential to the conduct of foreign relations. Candid exchange such as the letter that is the subject of this litigation can only occur in a confidential setting. Such a setting is often essential to explore and resolve issues and concerns and achieve U.S. foreign policy goals. Further, the information that the United States acquires in confidence from other governments, or instrumentalities thereof, is essential to the formulation of U.S. foreign policy and to the conduct of U.S. foreign relations. Disclosure, either voluntarily by the Department of State or by order of the Court, of foreign government information where there remains the expectation of confidentiality with which the information was provided would convey to British Government officials, and indeed to all other foreign government officials as well, that U.S. officials are not able or willing to preserve the confidentiality expected in such exchanges. Such officials would be less willing in the future to engage in candid discussion and to furnish information important to the conduct of

U.S. foreign relations and other governmental functions, and less disposed to cooperate in foreign relations matters of common interest.

4. When advised of the Court's latest decision in this case, the British Government requested that the letter remain confidential, as they had previously requested on three occasions spanning two different British Governments. In this case, the British Government specifically asked that the U.S. Government seek an appeal.

5. One important foreign policy objective of the United States in recent years has been to strengthen international cooperation on law enforcement matters such as those involved in the extradition case that is the subject of the document at issue in this litigation. This effort has led to an unprecedented level of cooperation between the government of the United States and foreign governments around the world. In fact, the cooperation between the United States and the British on law enforcement matters has been long and successful.

6. A breach of confidentiality in this instance could adversely affect our efforts with British officials and other governments. Cooperation between the U.S. and U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. for crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here. Consequently, dis-

closure of the British government information withheld in this case could reasonably be expected to cause damage to the foreign relations of the United States. Moreover, by calling into question the confidentiality of diplomatic exchanges generally, such a disclosure reasonably could also be expected to affect the more general bilateral relationship between the U.S. and the U.K. on law enforcement cooperation and other matters.

7. The ability of U.S. officials to make confidential assessments, analyses or recommendations on foreign relations or foreign activities is also essential to the conduct of foreign policy. It is necessary to have frank internal assessments by foreign government officials of their motivations, objectives and strategies, as well as of the implications for achieving U.S. foreign policy goals. If such material were made public, not only would the United States be seriously disadvantaged in pursuing its objectives, but also bilateral relations often would be adversely affected by the reaction of foreign governments or officials to disclosure of their "candid" views.

8. Upon review of the document and the above factors, I conclude that revealing the letter from the British Home Secretary made in confidence to a U.S. official, reasonably could be expected to damage the national interest of the United States by dealing a setback to U.K. confidence in U.S. reliability as a law enforcement partner. In addition, by calling into question the expectation of confidentiality in diplomatic exchanges and revealing the confidential assessments of the British Government, release reasonably could be

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expected to damage other aspects of the bilateral relationship that are important to the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C.

/s/ STROBE TALBOTT
STROBE TALBOTT

March 2, 1999

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APPENDIX J

Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (3 C.F.R. 333 (1996)) provides:

Classified National Security Information

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national interest has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, and our participation within the community of nations. Protecting information critical to our Nation's security remains a priority. In recent years, however, dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1—ORIGINAL CLASSIFICATION

Section 1.1. Definitions. For purposes of this order:

(a) "National security" means the national defense or foreign relations of the United States.

(b) "Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by,

produced by or for, or is under the control of the United States Government. "Control" means the authority of the agency that originates information, or its successor in function, to regulate access to the information.

(c) "Classified national security information" (hereafter "classified information") means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(d) "Foreign Government Information" means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as "Foreign Government Information" under the terms of a predecessor order.

(e) "Classification" means the act or process by which information is determined to be classified information.

(f) "Original classification" means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure.

(g) "Original classification authority" means an individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance.

(h) "Unauthorized disclosure" means a communication or physical transfer of classified information to an unauthorized recipient.

(i) "Agency" means any "Executive agency," as defined in 5 U.S.C. 105, and any other entity within the executive branch that comes into the possession of classified information.

(j) "Senior agency official" means the official designated by the agency head under section 5.6(c) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.

(k) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(l) "Damage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of

information, to include the sensitivity, value, and utility of that information.

Sec. 1.2. Classification Standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in section 1.5 of this order; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

- (1) amplify or modify the substantive criteria or procedures for classification; or
- (2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

Sec. 1.3. Classification Levels. (a) Information may be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

(c) If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.

Sec. 1.4. Classification Authority. (a) The authority to classify information originally may be exercised only by:

- (1) the President;
- (2) agency heads and officials designated by the President in the **Federal Register**; or
- (3) United States Government officials delegated this authority pursuant to paragraph (c), below.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) "Top Secret" original classification authority may be delegated only by the President or by an agency head or official designated pursuant to paragraph (a)(2), above.

(3) "Secret" or "Confidential" original classification authority may be delegated only by the President; an agency head or official designated pursuant to paragraph (a)(2), above; or the senior agency official, provided that official has been delegated "Top Secret" original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position title.

(d) Original classification authorities must receive training in original classification as provided in this order and its implementing directives.

(e) Exceptional cases. When an employee, contractor, licensee, certificate holder, or grantee of an agency

that does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommendations, to that agency for a classification determination.

Sec. 1.5. Classification Categories.

Information may not be considered for classification unless it concerns:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;
- (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;
- (e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities; or

(g) vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security.

Sec. 1.6. Duration of Classification. (a) At the time of original classification, the original classification authority shall attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity of the information. The date or event shall not exceed the time frame in paragraph (b), below.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, except as provided in paragraph (d), below.

(c) An original classification authority may extend the duration of classification or reclassify specific information for successive periods not to exceed 10 years at a time if such action is consistent with the standards and procedures established under this order. This provision does not apply to information contained in records that are more than 25 years old and have been determined to have permanent historical value under title 44, United States Code.

(d) At the time of original classification, the original classification authority may exempt from declassification within 10 years specific information, the unauthorized disclosure of which could reasonably be expected to cause damage to the national security for a period greater than that provided in paragraph (b),

above, and the release of which could reasonably be expected to:

(1) reveal an intelligence source, method, or activity, or a cryptologic system or activity;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

(3) reveal information that would impair the development or use of technology within a United States weapons system;

(4) reveal United States military plans, or national security emergency preparedness plans;

(5) reveal foreign government information;

(6) damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for a period greater than that provided in paragraph (b), above;

(7) impair the ability of responsible United States Government officials to protect the President, the Vice President, and other individuals for whom protection services, in the interest of national security, are authorized; or

(8) violate a statute, treaty, or international agreement.

(e) Information marked for an indefinite duration of classification under predecessor orders, for example, "Originating Agency's Determination Required," or information classified under predecessor orders that

contains no declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.7. Identification and Markings. (a) At the time of original classification, the following shall appear on the face of each classified document, or shall be applied to other classified media in an appropriate manner:

- (1) one of the three classification levels defined in section 1.3 of this order;
 - (2) the identity, by name or personal identifier and position, of the original classification authority;
 - (3) the agency and office of origin, if not otherwise evident;
 - (4) declassification instructions, which shall indicate one of the following:
 - (A) the date or event for declassification, as prescribed in section 1.6(a) or section 1.6(c); or
 - (B) the date that is 10 years from the date of original classification, as prescribed in section 1.6(b); or
 - (C) the exemption category from declassification, as prescribed in section 1.6(d); and
 - (5) a concise reason for classification which, at a minimum, cites the applicable classification categories in section 1.5 of this order.
- (b) Specific information contained in paragraph (a), above, may be excluded if it would reveal additional classified information.

(c) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, which portions are exempt from declassification under section 1.6(d) of this order, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant waivers of this requirement for specified classes of documents or information. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classi-

fied information constitutes a small portion of an otherwise unclassified document.

Sec. 1.8. Classification Prohibitions and Limitations .

(a) In no case shall information be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of national security.

(b) Basic scientific research information not clearly related to the national security may not be classified.

(c) Information may not be reclassified after it has been declassified and released to the public under proper authority.

(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.6 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.6 of this order. This provision does not apply to classified information contained in records that are

more than 25 years old and have been determined to have permanent historical value under title 44, United States Code.

(e) Compilations of items of information which are individually unclassified may be classified if the compiled information reveals an additional association or relationship that:

(1) meets the standards for classification under this order; and

(2) is not otherwise revealed in the individual items of information.

As used in this order, "compilation" means an aggregation of pre-existing unclassified items of information.

Sec. 1.9. Classification Challenges. (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b), below.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall assure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel established by section 5.4 of this order.

PART 2—DERIVATIVE CLASSIFICATION

Sec. 2.1. Definitions. For purposes of this order:

(a) "Derivative classification" means the incorporating, paraphrasing, restating or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(b) "Classification guidance" means any instruction or source that prescribes the classification of specific information.

(c) "Classification guide" means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(d) "Source document" means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

(e) "Multiple sources" means two or more source documents, classification guides, or a combination of both.

Sec. 2.2. Use of Derivative Classification. (a) Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) observe and respect original classification decisions; and

(2) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:

(A) the date or event for declassification that corresponds to the longest period of classification among the sources; and

(B) a listing of these sources on or attached to the official file or record copy.

Sec. 2.3. Classification Guides. (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official; and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agencies shall establish procedures to assure that classification guides are reviewed and updated as provided in directives issued under this order.

PART 3—DECLASSIFICATION AND DOWNGRADING

Sec. 3.1. Definitions. For purposes of this order:

(a) "Declassification" means the authorized change in the status of information from classified information to unclassified information.

(b) "Automatic declassification" means the declassification of information based solely upon:

(1) the occurrence of a specific date or event as determined by the original classification authority;
or

(2) the expiration of a maximum time frame for duration of classification established under this order.

(c) "Declassification authority" means:

(1) the official who authorized the original classification, if that official is still serving in the same position;

(2) the originator's current successor in function;

(3) a supervisory official of either; or

(4) officials delegated declassification authority in writing by the agency head or the senior agency official.

(d) "Mandatory declassification review" means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.6 of this order.

(e) "Systematic declassification review" means the review for declassification of classified information contained in records that have been determined by the Archivist of the United States ("Archivist") to have permanent historical value in accordance with chapter 33 of title 44, United States Code.

(f) "Declassification guide" means written instructions issued by a declassification authority that describes the elements of information regarding a specific subject that may be declassified and the elements that must remain classified.

(g) "Downgrading" means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(h) "File series" means documentary material, regardless of its physical form or characteristics, that is arranged in accordance with a filing system or maintained as a unit because it pertains to the same function or activity.

Sec. 3.2. Authority for Declassification. (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

(b) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information

may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure. This provision does not:

- (1) amplify or modify the substantive criteria or procedures for classification; or
- (2) create any substantive or procedural rights subject to judicial review.

(c) If the Director of the Information Security Oversight Office determines that information is classified in violation of this order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the President through the Assistant to the President for National Security Affairs. The information shall remain classified pending a prompt decision on the appeal.

(d) The provisions of this section shall also apply to agencies that, under the terms of this order, do not have original classification authority, but had such authority under predecessor orders.

Sec. 3.3. Transferred Information. (a) In the case of classified information transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this order.

(b) In the case of classified information that is not officially transferred as described in paragraph (a), above, but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such information shall be deemed to be the originating agency for purposes of this order. Such information may be declassified or downgraded by the agency in possession after consultation with any other agency that has an interest in the subject matter of the information.

(c) Classified information accessioned into the National Archives and Records Administration ("National Archives") as of the effective date of this order shall be declassified or downgraded by the Archivist in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

(d) The originating agency shall take all reasonable steps to declassify classified information contained in records determined to have permanent historical value before they are accessioned into the National Archives. However, the Archivist may require that records containing classified information be accessioned into the National Archives when necessary to comply with the provisions of the Federal Records Act. This provision does not apply to information being transferred to the Archivist pursuant to section 2203 of title 44, United States Code, or information for which the National Archives and Records Administration serves as the custodian of the records of an agency or organization that goes out of existence.

(e) To the extent practicable, agencies shall adopt a system of records management that will facilitate the public release of documents at the time such documents are declassified pursuant to the provisions for automatic declassification in sections 1.6 and 3.4 of this order.

Sec. 3.4. Automatic Declassification. (a) Subject to paragraph (b), below, within 5 years from the date of this order, all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. Subsequently, all classified information in such records shall be automatically declassified no longer than 25 years from the date of its original classification, except as provided in paragraph (b), below.

(b) An agency head may exempt from automatic declassification under paragraph (a), above, specific information, the release of which should be expected to:

(1) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state of the art technology within a U.S. weapon system;

(5) reveal actual U.S. military war plans that remain in effect;

(6) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

(7) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

(8) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans; or

(9) violate a statute, treaty, or international agreement.

(c) No later than the effective date of this order, an agency head shall notify the President through the Assistant to the President for National Security Affairs of any specific file series of records for which a review or assessment has determined that the information within those file series almost invariably falls within one or more of the exemption categories listed in paragraph (b), above, and which the agency proposes to exempt from automatic declassification. The notification shall include:

- (1) a description of the file series;
- (2) an explanation of why the information within the file series is almost invariably exempt from automatic declassification and why the information must remain classified for a longer period of time; and
- (3) except for the identity of a confidential human source or a human intelligence source, as provided in paragraph (b), above, a specific date or event for declassification of the information.

The President may direct the agency head not to exempt the file series or to declassify the information within that series at an earlier date than recommended.

(d) At least 180 days before information is automatically declassified under this section, an agency head or senior agency official shall notify the Director of the Information Security Oversight Office, serving as Executive Secretary of the Interagency Security Classification Appeals Panel, of any specific information beyond that included in a notification to the President under paragraph (c), above, that the agency proposes to exempt from automatic declassification. The notification shall include:

- (1) a description of the information;
- (2) an explanation of why the information is exempt from automatic declassification and must remain classified for a longer period of time; and
- (3) except for the identity of a confidential human source or a human intelligence source, as provided in paragraph (b), above, a specific date or event for declassification of the information. The Panel may

direct the agency not to exempt the information or to declassify it at an earlier date than recommended. The agency head may appeal such a decision to the President through the Assistant to the President for National Security Affairs. The information will remain classified while such an appeal is pending.

(e) No later than the effective date of this order, the agency head or senior agency official shall provide the Director of the Information Security Oversight Office with a plan for compliance with the requirements of this section, including the establishment of interim target dates. Each such plan shall include the requirement that the agency declassify at least 15 percent of the records affected by this section no later than 1 year from the effective date of this order, and similar commitments for subsequent years until the effective date for automatic declassification.

(f) Information exempted from automatic declassification under this section shall remain subject to the mandatory and systematic declassification review provisions of this order.

(g) The Secretary of State shall determine when the United States should commence negotiations with the appropriate officials of a foreign government or international organization of governments to modify any treaty or international agreement that requires the classification of information contained in records affected by this section for a period longer than 25 years from the date of its creation, unless the treaty or international agreement pertains to information that may otherwise remain classified beyond 25 years under this section.

Sec. 3.5. Systematic Declassification Review. (a) Each agency that has originated classified information under this order or its predecessors shall establish and conduct a program for systematic declassification review. This program shall apply to historically valuable records exempted from automatic declassification under section 3.4 of this order. Agencies shall prioritize the systematic review of records based upon:

(1) recommendations of the Information Security Policy Advisory Council, established in section 5.5 of this order, on specific subject areas for systematic review concentration; or

(2) the degree of researcher interest and the likelihood of declassification upon review.

(b) The Archivist shall conduct a systematic declassification review program for classified information: (1) accessioned into the National Archives as of the effective date of this order; (2) information transferred to the Archivist pursuant to section 2203 of title 44, United States Code; and (3) information for which the National Archives and Records Administration serves as the custodian of the records of an agency or organization that has gone out of existence. This program shall apply to pertinent records no later than 25 years from the date of their creation. The Archivist shall establish priorities for the systematic review of these records based upon the recommendations of the Information Security Policy Advisory Council; or the degree of researcher interest and the likelihood of declassification upon review. These records shall be reviewed in accordance with the standards of this order, its implementing directives, and declassification guides provided to the Archivist by each agency that

originated the records. The Director of the Information Security Oversight Office shall assure that agencies provide the Archivist with adequate and current declassification guides.

(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

Sec. 3.6. Mandatory Declassification Review. (a) Except as provided in paragraph (b), below, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

(1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(2) the information is not exempted from search and review under the Central Intelligence Agency Information Act; and

(3) the information has not been reviewed for declassification within the past 2 years. If the agency has reviewed the information within the past 2 years, or the information is the subject of pending litigation, the agency shall inform the requester of this fact and of the requester's appeal rights.

(b) Information originated by:

- (1) the incumbent President;
- (2) the incumbent President's White House Staff;
- (3) committees, commissions, or boards appointed by the incumbent President; or
- (4) other entities within the Executive Office of the President that solely advise and assist the incumbent President is exempted from the provisions of paragraph (a), above. However, the Archivist shall have the authority to review, downgrade, and declassify information of former Presidents under the control of the Archivist pursuant to sections 2107, 2111, 2111 note, or 2203 of title 44, United States Code. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective Presidential papers or records. Agencies with primary subject matter interest shall be notified promptly of the Archivist's decision. Any final decision by the Archivist may be appealed by the requester or an agency to the Interagency Security Classification Appeals Panel. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order. They shall release this information unless withholding is otherwise authorized and warranted under applicable law.

(d) In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Interagency Security Classification Appeals Panel.

(e) After consultation with affected agencies, the Secretary of Defense shall develop special procedures for the review of cryptologic information, the Director of Central Intelligence shall develop special procedures for the review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods, and the Archivist shall develop special procedures for the review of information accessioned into the National Archives.

Sec. 3.7. Processing Requests and Reviews. In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this order, or pursuant to the automatic declassification or systematic review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order.

(b) When an agency receives any request for documents in its custody that contain information that was originally classified by another agency, or comes across such documents in the process of the automatic

declassification or systematic review provisions of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing, and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order. In cases in which the originating agency determines in writing that a response under paragraph (a), above, is required, the referring agency shall respond to the requester in accordance with that paragraph.

Sec. 3.8. Declassification Database. (a) The Archivist in conjunction with the Director of the Information Security Oversight Office and those agencies that originate classified information, shall establish a Government wide database of information that has been declassified. The Archivist shall also explore other possible uses of technology to facilitate the declassification process.

(b) Agency heads shall fully cooperate with the Archivist in these efforts.

(c) Except as otherwise authorized and warranted by law, all declassified information contained within the database established under paragraph (a), above, shall be available to the public.

PART 4—SAFEGUARDING

Sec. 4.1. Definitions. For purposes of this order: (a) "Safeguarding" means measures and controls that are prescribed to protect classified information.

(b) "Access" means the ability or opportunity to gain knowledge of classified information.

(c) "Need-to-know" means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(d) "Automated information system" means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(e) "Integrity" means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(f) "Network" means a system of two or more computers that can exchange data or information.

(g) "Telecommunications" means the preparation, transmission, or communication of information by electronic means.

(h) "Special access program" means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Sec. 4.2. General Restrictions on Access. (a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

(b) Classified information shall remain under the control of the originating agency or its successor in function. An agency shall not disclose information originally classified by another agency without its authorization. An official or employee leaving agency service may not remove classified information from the agency's control.

(c) Classified information may not be removed from official premises without proper authorization.

(d) Persons authorized to disseminate classified information outside the executive branch shall assure the protection of the information in a manner equivalent to that provided within the executive branch.

(e) Consistent with law, directives, and regulation, an agency head or senior agency official shall establish uniform procedures to ensure that automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information have controls that:

(1) prevent access by unauthorized persons; and

(2) ensure the integrity of the information.

(f) Consistent with law, directives, and regulation, each agency head or senior agency official shall establish controls to ensure that classified information is used, processed, stored, reproduced, transmitted, and

destroyed under conditions that provide adequate protection and prevent access by unauthorized persons.

(g) Consistent with directives issued pursuant to this order, an agency shall safeguard foreign government information under standards that provide a degree of protection at least equivalent to that required by the government or international organization of governments that furnished the information. When adequate to achieve equivalency, these standards may be less restrictive than the safeguarding standards that ordinarily apply to United States "Confidential" information, including allowing access to individuals with a need-to-know who have not otherwise been cleared for access to classified information or executed an approved nondisclosure agreement.

(h) Except as provided by statute or directives issued pursuant to this order, classified information originating in one agency may not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. An agency head or senior agency official may waive this requirement for specific information originated within that agency. For purposes of this section, the Department of Defense shall be considered one agency.

Sec. 4.3. Distribution Controls. (a) Each agency shall establish controls over the distribution of classified information to assure that it is distributed only to organizations or individuals eligible for access who also have a need-to-know the information.

(b) Each agency shall update, at least annually, the automatic, routine, or recurring distribution of classified information that they distribute. Recipients shall cooperate fully with distributors who are updating

distribution lists and shall notify distributors whenever a relevant change in status occurs.

Sec. 4.4. Special Access Programs. (a) Establishment of special access programs. Unless otherwise authorized by the President, only the Secretaries of State, Defense and Energy, and the Director of Central Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence activities (including special activities, but not including military operational, strategic and tactical programs), or intelligence sources or methods, this function will be exercised by the Director of Central Intelligence. These officials shall keep the number of these programs at an absolute minimum, and shall establish them only upon a specific finding that:

- (1) the vulnerability of, or threat to, specific information is exceptional; and
- (2) the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure; or
- (3) the program is required by statute.

(b) Requirements and Limitations. (1) Special access programs shall be limited to programs in which the number of persons who will have access ordinarily will be reasonably small and commensurate with the objective of providing enhanced protection for the information involved.

- (2) Each agency head shall establish and maintain a system of accounting for special access programs

consistent with directives issued pursuant to this order.

(3) Special access programs shall be subject to the oversight program established under section 5.6(c) of this order. In addition, the Director of the Information Security Oversight Office shall be afforded access to these programs, in accordance with the security requirements of each program, in order to perform the functions assigned to the Information Security Oversight Office under this order. An agency head may limit access to a special access program to the Director and no more than one other employee of the Information Security Oversight Office; or, for special access programs that are extraordinarily sensitive and vulnerable, to the Director only.

(4) The agency head or principal deputy shall review annually each special access program to determine whether it continues to meet the requirements of this order.

(5) Upon request, an agency shall brief the Assistant to the President for National Security Affairs, or his or her designee, on any or all of the agency's special access programs.

(c) Within 180 days after the effective date of this order, each agency head or principal deputy shall review all existing special access programs under the agency's jurisdiction. These officials shall terminate any special access programs that do not clearly meet the provisions of this order. Each existing special access program that an agency head or principal deputy

validates shall be treated as if it were established on the effective date of this order.

(d) Nothing in this order shall supersede any requirement made by or under 10 U.S.C. 119.

Sec. 4.5. Access by Historical Researchers and Former Presidential Appointees. (a) The requirement in section 4.2(a)(3) of this order that access to classified information may be granted only to individuals who have a need-to-know the information may be waived for persons who:

- (1) are engaged in historical research projects; or
- (2) previously have occupied policy-making positions to which they were appointed by the President.

(b) Waivers under this section may be granted only if the agency head or senior agency official of the originating agency:

- (1) determines in writing that access is consistent with the interest of national security;
- (2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order; and
- (3) limits the access granted to former Presidential appointees to items that the person originated, reviewed, signed, or received while serving as a Presidential appointee.

PART 5—IMPLEMENTATION AND REVIEW

Sec. 5.1. Definitions. For purposes of this order: (a) "Self-inspection" means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the implementation of the program established under this order and its implementing directives.

(b) "Violation" means:

- (1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;
- (2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or
- (3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.

(c) "Infraction" means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not comprise a "violation," as defined above.

Sec. 5.2. Program Direction. (a) The Director of the Office of Management and Budget, in consultation with the Assistant to the President for National Security Affairs and the co-chairs of the Security Policy Board, shall issue such directives as are necessary to implement this order. These directives shall be binding upon

the agencies. Directives issued by the Director of the Office of Management and Budget shall establish standards for:

- (1) classification and marking principles;
- (2) agency security education and training programs;
- (3) agency self-inspection programs; and
- (4) classification and declassification guides.

(b) The Director of the Office of Management and Budget shall delegate the implementation and monitoring functions of this program to the Director of the Information Security Oversight Office.

(c) The Security Policy Board, established by a Presidential Decision Directive, shall make a recommendation to the President through the Assistant to the President for National Security Affairs with respect to the issuance of a Presidential directive on safeguarding classified information. The Presidential directive shall pertain to the handling, storage, distribution, transmittal, and destruction of and accounting for classified information.

Sec. 5.3. Information Security Oversight Office. (a) There is established within the Office of Management and Budget an Information Security Oversight Office. The Director of the Office of Management and Budget shall appoint the Director of the Information Security Oversight Office, subject to the approval of the President.

(b) Under the direction of the Director of the Office of Management and Budget acting in consultation with

the Assistant to the President for National Security Affairs, the Director of the Information Security Oversight Office shall:

- (1) develop directives for the implementation of this order;
- (2) oversee agency actions to ensure compliance with this order and its implementing directives;
- (3) review and approve agency implementing regulations and agency guides for systematic declassification review prior to their issuance by the agency;
- (4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill its responsibilities. If granting access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior agency official shall submit a written justification recommending the denial of access to the Director of the Office of Management and Budget within 60 days of the request for access. Access shall be denied pending a prompt decision by the Director of the Office of Management and Budget, who shall consult on this decision with the Assistant to the President for National Security Affairs;
- (5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend Presidential approval

through the Director of the Office of Management and Budget;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order;

(7) have the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order;

(8) report at least annually to the President on the implementation of this order; and

(9) convene and chair interagency meetings to discuss matters pertaining to the program established by this order.

Sec. 5.4. Interagency Security Classification Appeals Panel.

(a) Establishment and Administration.

(1) There is established an Interagency Security Classification Appeals Panel ("Panel"). The Secretaries of State and Defense, the Attorney General, the Director of Central Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs shall each appoint a senior level representative to serve as a member of the Panel. The President shall select the Chair of the Panel from among the Panel members.

(2) A vacancy on the Panel shall be filled as quickly as possible as provided in paragraph (1), above.

(3) The Director of the Information Security Oversight Office shall serve as the Executive Secretary. The staff of the Information Security Oversight Office shall provide program and administrative support for the Panel.

(4) The members and staff of the Panel shall be required to meet eligibility for access standards in order to fulfill the Panel's functions.

(5) The Panel shall meet at the call of the Chair. The Chair shall schedule meetings as may be necessary for the Panel to fulfill its functions in a timely manner.

(6) The Information Security Oversight Office shall include in its reports to the President a summary of the Panel's activities.

(b) Functions. The Panel shall:

(1) decide on appeals by persons who have filed classification challenges under section 1.9 of this order;

(2) approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.4 of this order; and

(3) decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.6 of this order.

(c) Rules and Procedures. The Panel shall issue by-laws, which shall be published in the Federal Register

no later than 120 days from the effective date of this order. The bylaws shall establish the rules and procedures that the Panel will follow in accepting, considering, and issuing decisions on appeals. The rules and procedures of the Panel shall provide that the Panel will consider appeals only on actions in which: (1) the appellant has exhausted his or her administrative remedies within the responsible agency; (2) there is no current action pending on the issue within the federal courts; and (3) the information has not been the subject of review by the federal courts or the Panel within the past 2 years.

(d) Agency heads will cooperate fully with the Panel so that it can fulfill its functions in a timely and fully informed manner. An agency head may appeal a decision of the Panel to the President through the Assistant to the President for National Security Affairs. The Panel will report to the President through the Assistant to the President for National Security Affairs any instance in which it believes that an agency head is not cooperating fully with the Panel.

(e) The Appeals Panel is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States. Panel decisions are committed to the discretion of the Panel, unless reversed by the President.

Sec. 5.5. Information Security Policy Advisory Council.

(a) Establishment. There is established an Information Security Policy Advisory Council ("Council"). The Council shall be composed of seven members appointed by the President for staggered terms not to exceed 4

years, from among persons who have demonstrated interest and expertise in an area related to the subject matter of this order and are not otherwise employees of the Federal Government. The President shall appoint the Council Chair from among the members. The Council shall comply with the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2.

(b) Functions. The Council shall:

(1) advise the President, the Assistant to the President for National Security Affairs, the Director of the Office of Management and Budget, or such other executive branch officials as it deems appropriate, on policies established under this order or its implementing directives, including recommended changes to those policies;

(2) provide recommendations to agency heads for specific subject areas for systematic declassification review; and

(3) serve as a forum to discuss policy issues in dispute.

(c) Meetings. The Council shall meet at least twice each calendar year, and as determined by the Assistant to the President for National Security Affairs or the Director of the Office of Management and Budget.

(d) Administration.

(1) Each Council member may be compensated at a rate of pay not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the general schedule under section 5376 of title 5, United States Code, for each day during which that

member is engaged in the actual performance of the duties of the Council.

(2) While away from their homes or regular place of business in the actual performance of the duties of the Council, members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5703(b)).

(3) To the extent permitted by law and subject to the availability of funds, the Information Security Oversight Office shall provide the Council with administrative services, facilities, staff, and other support services necessary for the performance of its functions.

(4) Notwithstanding any other Executive order, the functions of the President under the Federal Advisory Committee Act, as amended, that are applicable to the Council, except that of reporting to the Congress, shall be performed by the Director of the Information Security Oversight Office in accordance with the guidelines and procedures established by the General Services Administration.

Sec. 5.6. General Responsibilities. Heads of agencies that originate or handle classified information shall:

(a) demonstrate personal commitment and commit senior management to the successful implementation of the program established under this order;

(b) commit necessary resources to the effective implementation of the program established under this order; and

(c) designate a senior agency official to direct and administer the program, whose responsibilities shall include:

(1) overseeing the agency's program established under this order, provided, an agency head may designate a separate official to oversee special access programs authorized under this order. This official shall provide a full accounting of the agency's special access programs at least annually;

(2) promulgating implementing regulations, which shall be published in the **Federal Register** to the extent that they affect members of the public;

(3) establishing and maintaining security education and training programs;

(4) establishing and maintaining an ongoing self-inspection program, which shall include the periodic review and assessment of the agency's classified product;

(5) establishing procedures to prevent unnecessary access to classified information, including procedures that: (i) require that a need for access to classified information is established before initiating administrative clearance procedures; and (ii) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs;

(6) developing special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;

(7) assuring that the performance contract or other system used to rate civilian or military personnel performance includes the management of classified information as a critical element or item to be evaluated in the rating of: (i) original classification authorities; (ii) security managers or security specialists; and (iii) all other personnel whose duties significantly involve the creation or handling of classified information;

(8) accounting for the costs associated with the implementation of this order, which shall be reported to the Director of the Information Security Oversight Office for publication; and

(9) assigning in a prompt manner agency personnel to respond to any request, appeal, challenge, complaint, or suggestion arising out of this order that pertains to classified information that originated in a component of the agency that no longer exists and for which there is no clear successor in function.

Sec. 5.7. Sanctions. (a) If the Director of the Information Security Oversight Office finds that a violation of this order or its implementing directives may have occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

(1) disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) classify or continue the classification of information in violation of this order or any implementing directive;

(3) create or continue a special access program contrary to the requirements of this order; or

(4) contravene any other provision of this order or its implementing directives.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

(1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b), above, occurs; and

(2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2) or (3), above, occurs.

PART 6—GENERAL PROVISIONS

Sec. 6.1. General Provisions. (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(c) Nothing in this order limits the protection afforded any information by other provisions of law, including the exemptions to the Freedom of Information Act, the Privacy Act, and the National Security Act of 1947, as amended. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. The foregoing is in addition to the specific provisos set forth in sections 1.2(b), 3.2(b) and 5.4(e) of this order.

(d) Executive Order No. 12356 of April 6, 1982, is revoked as of the effective date of this order.

Sec. 6.2. Effective Date. This order shall become effective 180 days from the date of this order.

/s/ WILLIAM J. CLINTON
WILLIAM J. CLINTON
THE WHITE HOUSE,
April 17, 1995.

No. 98-1904

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF JUSTICE; AND UNITED STATES
DEPARTMENT OF STATE,

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI

CHARLES J. COOPER*
ANDREW G. MCBRIDE
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-4944
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QUESTION PRESENTED

Whether the first court of appeals' decision under Exemption 1 of the Freedom of Information Act ("FOIA") to interpret and apply a new and significantly less protective executive order governing classification properly rejected the government's generalized and conclusory statements of possible harm involving the release of a single letter whose content is admittedly innocuous.

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STATEMENT OF THE CASE

1. The Freedom of Information Act, 5 U.S.C. § 552 was originally enacted in 1966 as an amendment to Section 3 of the Administrative Procedure Act. See Pub. L. No. 89-554, 80 Stat. 378 (Sept. 6, 1966).¹ The amendment was thought necessary because "Section 3 was generally recognized as falling short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." *EPA v. Mink*, 410 U.S. 73, 79 (1973) (citations omitted). As this Court has recognized many times, the FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965)). See also *Department of Defense v. F.L.R.A.*, 510 U.S. 487, 494 (1994) (same); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 & n.4 (1989) (same). Because "disclosure, not secrecy, is the dominant objective of [FOIA]" *Rose*, 425 U.S. at 361, the nine specific exemptions to disclosure contained in the statute are to be narrowly construed. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.") (citations omitted). See also *id.* ("Congress sought 'to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the availability of records to the public is not limited, except as specifically stated.'" (quoting *FBI v. Abramson*, 456 U.S. 615, 642 (1982) (O'Connor, J., dissenting)) (emphasis in original) (further citations omitted). It is also common ground that the government bears the burden of proof in justifying the invocation of any exemption.

¹ Petitioners' omission of any discussion regarding the background of FOIA Exemption 1 or the genesis of the new executive order issued by President Clinton in 1995 has required an expanded statement of the case by Respondent.

Department of State v. Ray, 502 U.S. 164, 173 (1991) ("[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.") (citations omitted).

The evolution of Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), exemplifies Congress' commitment to disclosure tempered only by carefully circumscribed areas of necessary government secrecy. Exemption 1 originally exempted from disclosure any matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1973). In 1973, this Court held in *EPA v. Mink*, that FOIA did not authorize judicial review of "the soundness of executive security classifications" or *in camera* inspection of documents withheld under Exemption 1. *Mink*, 410 U.S. at 84.

Congress responded swiftly. In 1974 it amended FOIA and specifically overruled this Court's decision in *Mink*. Pub. L. No. 93-502 §§ 1-3, 88 Stat. 1561 (Nov. 21, 1974). Exemption 1 was amended to require both that the matters withheld be "specifically authorized under criteria established by an Executive order to be kept secret" and that such matters be "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(A) & (B) (1999). In the same 1974 amendments, Congress also amended the statute to make clear that the burden is on the withholding agency to establish the applicability of an exemption, that the reviewing court is authorized to examine the withheld information *in camera*, and that "the court shall determine the matter *de novo*." 5 U.S.C. § 552(a)(4)(B).

Thus, as amended, Exemption 1 is unique among the FOIA exemptions. It places the initial decision as to the criteria for classification entirely within the discretion of the Executive Branch. At the same time, it requires the Executive to scrupulously adhere to whatever substantive criteria he promulgates. Moreover, contrary to *Mink*, the federal courts are now expressly required to ascertain whether a matter is properly classified under the criteria and procedures chosen by the Executive. Nor do the

highly deferential standards of review generally applicable to agency action apply; rather, federal courts must determine the matter *de novo*. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district court to 'determine the matter *de novo*.'" *Reporters Comm.*, 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B)). Thus, under Exemption 1 the Executive Branch is the exclusive source of both the procedural and substantive requirements for classification. Under FOIA, the courts are required to ensure that the Executive abides by his own executive order.

In order to properly undertake judicial review of FOIA exemption claims, the federal courts have developed the concept of a *Vaughn* index, named for the District of Columbia Circuit's seminal decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Consistent with the burden allocation in FOIA, *Vaughn* places the initial burden on the agency to come forward with specific and detailed justifications identifying the subject matter withheld and giving a "relatively detailed analysis" as to why an exemption applies. *Id.* at 826. *See also id.* ("[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions.") (footnote omitted). The *Vaughn* procedure allows for at least a modified form of the adversarial process in a context where the requestor is necessarily in the dark as to the content of the documents at issue in the case. The *Vaughn* procedure has been adopted by every federal circuit. It applies to every FOIA exemption, including Exemption 1. *See, e.g., Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

2. The first executive order prescribing a classification system for government secrets was promulgated by President Franklin D. Roosevelt in 1940. Exec. Order No. 8,381, 3 C.F.R. 634 (1941). In 1951, President Truman promulgated a comprehensive and highly restrictive regime for the protection of state secrets. Exec. Order No. 10,290, 3 C.F.R. 789 (1952). President Truman's order was roundly criticized as too restrictive and a succession of executive

orders from President Eisenhower through President Carter gradually relaxed the standards for classification. See generally Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 690 n.3 (1984). This trend culminated in President Carter's 1978 executive order that required classifying officials to point to "identifiable damage" from disclosure. It also provided that any uncertainty as to disclosure should be resolved in favor of public access. See Exec. Order No. 12,065, 3 C.F.R. 190 (1979) (hereinafter "Carter Order").

On April 2, 1982, President Reagan issued Executive Order No. 12,356, superseding the prior order promulgated by President Carter. Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (hereinafter "Reagan Order," reprinted in the Appendix hereto ("Resp. App.") at 1a-25a.). The Reagan Order significantly broadened the power of executive agencies to classify information pursuant to national security and foreign policy concerns. First, it eliminated the provision of the Carter Order conferring discretion on classifying officials to balance the public interest in disclosure against national security concerns. Second, it reestablished the presumption in favor of classification in the case of doubt. Resp. App. 3a. Third, it eliminated the requirement of the Carter Order that a classifying official point to "identifiable damage" from disclosure. Resp. App. 7a. Fourth, it reestablished the so-called "mosaic" theory of classification, by providing that information should be classified where its unauthorized disclosure, "either by itself or in the context of other information," could be expected to cause damage to the national security. Resp. App. 7a. Finally, and most important here, the Reagan Order erected a presumption that the national security would be damaged by the revelation of "foreign government information": "Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed

to cause damage to the national security." Resp. App. 7a (emphasis added). The term "foreign government information" was defined to include: "information provided by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence." Resp. App. 24a (emphasis added).²

On April 17, 1995, in fulfillment of a campaign promise, President Clinton issued an executive order that reversed President Reagan's protective approach to national security information and went beyond even President Carter's executive order in discouraging classification and promoting disclosure. Exec. Order No. 12,958, 3 C.F.R. 333 (1996) ("Clinton Order") (reprinted in Appendix to the Petition for Certiorari ("Pet. App.") 65a-111a). Designed specifically to "emphasize our commitment to open Government," the Clinton Order reinstated the Carter Order's presumption in favor of disclosure rather than classification in the case of any uncertainty. Pet. App. 65a, 68a. The Clinton Order also eliminated the "mosaic" theory of classification based on context and specifically eliminated the presumption that the release of foreign government information would cause harm to the national security. Instead, for all classification decisions, the Clinton Order requires the classification authority to be "able to identify or describe the damage" to national security. Pet. App. 68a. The Clinton Order eliminates the Reagan Order's

² President Reagan's executive order was roundly criticized as overly protective by academics, see generally, Cheh, *supra*; Anthony R. Klein, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 FED. COM. L.J. 433 (1990), by the press, see Floyd Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine) at 22-23, and by some members of Congress who proposed legislative intervention to reestablish the more open Carter regime. See S. 1335, 98th Cong., 1st Sess. § 3 (1983) (bill sponsored by Sen. Durenberger to amend Exemption 1 to reverse Reagan Order).

allowance that an expectation of confidentiality may be "expressed or implied," Resp. App. 24a, for information to qualify as foreign government information. Pet. App. 66a. Finally, the Clinton Order adopts the following definition: "'Damage to the national security' means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." Pet. App. 67a-68a. This was not a defined term in the Reagan Order.

Under the Clinton Order there is no longer a presumption that government-to-government communications are not subject to disclosure. The fact that such communications are exchanged in confidence is irrelevant; all "foreign government information" is, by definition, exchanged in confidence. Pet. App. 66a. More must now be shown under the Clinton Order in order to justify withholding diplomatic communications under Exemption 1 – a specific harm must be identified or described and that harm must be linked to the dissemination of the information itself. Pet. App. 67a-68a.

President Clinton's signing statement issued in conjunction with the new executive order left no doubt that he intended the order to "sharply reduce the permitted level of secrecy in our Government." 31 WEEKLY COMP. PRES. DOC. 633 (Apr. 17, 1995) Resp. App. 26a-28a. The statement indicates that "[t]his order establishes many firsts: Classifiers will have to justify what they classify. . . ." Resp. App. 27a. The President's statement makes particularly clear that the Clinton Order eliminates any presumption that certain categories of documents are not subject to disclosure:

[W]e will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. We will not permit the reclassification of information after it has been declassified and disclosed under proper

authority. We will authorize agency heads to balance the public interest in disclosure against the national security interest in making declassification decisions. And, *we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.*

Resp. App. 27a (emphasis added).³ Implementation of the Clinton Order, the President stated, "will greatly reduce the amount of information that we classify in the first place and the amount that remains classified." Resp. App. 28a.

As we discuss in detail below, given this background and the broad claims of increased access made in conjunction with the Clinton Order, this Court should cast a wary eye indeed at the Solicitor General's suggestions that the changes wrought by the new order are mere "happenstance," Petition for Certiorari ("Pet.") at 22, and that court of appeals decisions applying the Reagan Order somehow "conflict" with the decision below. Pet. at 13-14. Rather, as the district court noted, the Clinton Order constitutes a "major shift in policy." Pet. App. 25a. Indeed, in the court below, the government argued that the Reagan Order applied and was dispositive. Pet. App. 26a-27a. Now, the Solicitor General tells this Court that the differences between the two orders are immaterial.

4. Respondent Leslie R. Weatherhead is a lawyer in private practice in Spokane, Washington. Respondent represented Sally-Anne Croft, a British national, who was indicted in 1990 by a federal grand jury in Oregon on two counts of conspiracy. The first alleged conspiracy contemplated an attack on a federal officer (it was never attempted), and the second alleged conspiracy involved illegal interstate transportation of firearms. Sometime after

³ Evidently, this new policy favoring disclosure over classification was not supported by all the affected agencies within the Executive Branch. See, e.g., R. Jeffrey Smith, *CIA, Others Opposing White House Move to Bare Decades-Old Secrets*, Washington Post, Mar. 30, 1994, at A14.

her indictment, the United States requested Croft's extradition by the British government.

The United States' request for Croft's extradition was attended by considerable controversy in Great Britain. The British (among them, specifically, several members of the House of Lords) publicly worried about whether Croft, an accountant who had been a follower of the guru Bhagwan Shree Rajneesh, could receive a fair trial in the District of Oregon, a place where Rajneesh had established his commune and had achieved especial notoriety and hostile press coverage. In their requests for extradition, American officials reassured the British that any prejudice could be dealt with under American procedural law by a change of venue as well as other mechanisms to ensure an impartial petit jury. Pet. App. 2a-3a.

On or about July 28, 1994, Croft and her codefendant were extradited from Great Britain to the United States. Shortly after her first appearance, Croft requested a change of venue based on a widespread and pervasive prejudice against Rajneesh and his "cult" members throughout the District of Oregon. The government opposed Croft's request for a change of venue and, in fact, even opposed any evidentiary hearing into the extent of local prejudice against the Rajneesh group.

Respondent, Croft's attorney, learned of the letter at issue in this case, a July 28, 1994, letter sent by the British Home Office to the Department of Justice, in conjunction with Croft's extradition to the United States. Respondent believed that the letter contained both an official expression of British concern over the issue of potential prejudice against Croft in Oregon and a recitation of the assurances regarding change of venue and other remedies that American officials had discussed with the British to induce extradition. Respondent believed that evidence of these British concerns and subsequent American assurances were relevant to the trial judge's decision whether to order a change of venue. Pet. App. 3a. Contrary to the government's present argument, it did disclose to the district court the British Government's refusal to extradite Croft for trial on

the firearms trafficking count. Pursuant to the doctrine of specialty, the firearms count was severed and not tried.⁴ However, the prosecutors had remained silent concerning any change of venue discussion in the British letter.

On November 29, 1994, Respondent requested a copy of the letter under the Freedom of Information Act from both the Departments of Justice ("Justice") and State ("State"). Although Respondent's request identified the letter by date, subject matter, and name of addressee, the government did not respond within ten days as then required by the Act. 5 U.S.C. § 552(a)(6)(A)(i).⁵ Indeed, the government failed to respond to the request for six full months. Finally, on May 4, 1995, State informed Respondent that it had been unable to locate the letter. Two weeks later, Justice informed Respondent that it had a copy of the letter, but had forwarded it to State for further review.

Respondent again wrote to both agencies, asking Justice for administrative review of its failure to provide him the letter, and asking State, now that it had the letter, to produce it. Neither Justice nor State replied that the letter was classified. Justice's administrative review officer

⁴ While Respondent cannot say with absolute certainty that the British Government's limitations on extradition were contained in the letter at issue here, everything in this record points to that fact. As we discuss in more detail below, *see infra* pp. 26-27, prosecutors are often required to disclose the extradition communications of foreign governments to state and federal courts in the United States under provisions of extradition treaties that may delimit the prosecution. This practice flies in the face of the government's assertion that these documents are categorically confidential. *See* Pet. App. 53a-54a (Sheils Declaration); Pet. App. 57a-58a (Kennedy Declaration).

⁵ A 1996 amendment, effective after the request in this case, extended to 20 business days the time agencies are given to respond to an initial FOIA request. *See* Pub. L. No. 104-231, 110 Stat. 3048, § 8(b) (1996).

remanded to the Criminal Division with instructions that Justice reconsider its refusal to disclose the letter. State wrote to the British Home Office, saying that State intended to release the letter and asking for British concurrence. The British government demurred, solely because it considered all government-to-government correspondence confidential, subject to an important qualification: "the normal line in cases like this is that all correspondence between Governments is confidential *unless papers have been formally requisitioned by the defense.*" Pet. App. 3a (internal quotations omitted) (emphasis added).⁶

On November 17, 1995, Respondent filed a complaint in federal district court for the Eastern District of Washington under FOIA, seeking to compel Justice and/or State to produce the letter. In December 1995, over a year after Respondent's initial FOIA request, State reported that it had classified the letter in October 1995. In February 1996, Justice informed Respondent that it had reconsidered its decision to withhold the letter and, in view of State's decision to classify the letter, would not release it.

With this administrative background, on February 16, 1996, Respondent moved for summary judgment. State and Justice produced declarations under oath from Mr. Peter M. Sheils, Pet. App. 48a - 54a, and Mr. Patrick F. Kennedy, Pet. App. 55a - 59a, both administrative officials at the State Department.⁷ Both declarations alluded to the general presumption that government-to-government communications should remain confidential and to the British government's request for continued confidentiality

⁶ The State Department's August 4, 1995, letter to the British government asking for permission to release the letter and the British response of October 18, 1995, are reprinted in the Appendix hereto at 29a-31a.

⁷ Mr. Sheils declaration was filed in opposition to Respondent's motion for summary judgment. Mr. Kennedy's declaration was filed after the district court's initial decision ordering disclosure in support of the government's motion to alter or amend judgment under Fed. R. Civ. P. 59(e).

in this case. See Pet. App. 52a (Sheils Declaration) ("There is a general understanding among governments that confidentiality is normally to be accorded exchanges between governments."); Pet. App. 56a (Kennedy Declaration) ("It is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials."). Significantly, neither declaration addressed the definition of harm contained in section 1.1(l), Pet. App. 67a-68a, of the new Clinton Order. Nor did either declaration attempt to identify or describe any harm that was reasonably likely to flow from the release of the information in the letter based on the sensitivity, value, or utility of the information as required by the Clinton Order.

On March 29, 1996, the district court granted Respondent's motion for summary judgment and ordered the letter released under FOIA. Pet. App. 29a - 42a. The district court first found that the letter did not meet the definition of "foreign government information" under section 1.1(d)(3) of the Clinton Order because there was no evidence that there was an expectation of confidentiality at the time the letter was sent to the United States. The district court noted:

Neither DOJ [Justice] nor DOS [State] treated the letter as confidential at the time of receipt. Neither agency classified the letter until nearly a year after the subject FOIA request. Neither asserted an exemption until more than a year after the request, and then only at the request of Great Britain.

Pet. App. 35a.

The district court did find that the letter met the more general definition of information concerning "foreign relations or foreign activities of the United States" under section 1.5(d) of the Clinton Order, Pet. App. 71a, and therefore came within one of the categories eligible for classification. Pet. App. 35a. Turning to the specification of anticipated harm from disclosure, the district court applied the universally accepted procedure for FOIA litigation established by *Vaughn v. Rosen*, 484 F.2d 820, 826-28.

Pet. App. 31a (citing *Vaughn*, 484 F.2d at 826-28), 39a. Under that standard, the agency's proof in support of nondisclosure must, at a minimum, provide "a particularized explanation of how disclosure of [the] specific [information]" at issue would damage the interest protected by the exemption. Pet. App. 39a. This, in the district court's view, the Sheils Declaration did not do. Its general and conclusory assertions about the confidentiality of all government-to-government communications could not be sufficient, or else all "foreign government information" would automatically be exempt from disclosure and much of the Clinton Order's new requirements would be rendered surplusage. Pet. App. 41a. Moreover, the Sheils Declaration failed completely to address the definition of harm in the Clinton Order, which "place[d] the focus on the information disclosed, not the act of disclosing." Pet. App. 40a. Finally, the district court found that Justice and State had not made an adequate showing that certain portions of the letter were not segregable. Pet. App. 40a.

Defendants State and Justice filed a motion to alter or amend judgment and to have the district court examine the letter *in camera*. The Kennedy Declaration, Pet. App. 55a-59a, was submitted as "new evidence" in support of the motion. Pet. App. 22a-23a. The district court found that the Kennedy Declaration did little more than recite the same generalized concerns as the Sheils Declaration. App. 22a-23a.⁸ Like the Sheils Declaration, the Kennedy Declaration relied upon a

⁸ In fact, as the district court noted, the Kennedy Declaration's references to State's letter of inquiry to the British government regarding Respondent's FOIA request cut against their claims of categorical confidentiality. State's letter strongly suggested that State intended to release the letter absent British protest. See Pet. App. 22a-23a ("The letter of inquiry cuts against defendants' position. It suggests that DOS [State] intended to comply with the FOIA request and would have but for the U.K.'s opposition ('Before complying with this request, we would appreciate the concurrence of your government in the release of the document').").

longstanding custom and practice of confidentiality in diplomatic communications. While not disputing that such a tradition existed, or that the British had invoked it here, the district court quite properly looked to the text of the Clinton Order itself:

There may be historical practices and protocols in diplomatic circles supportive of defendants' position, and probably are. In recognition of that history, Congress could have shielded all materials either generated or held by DOS [State] from FOIA disclosure, but chose instead to defer to the Executive Branch. The Executive Branch could have shielded all materials either generated or held by DOS [State] from FOIA disclosure, and for all practical purposes did so in 1982 when EO 12356 [Reagan Order] was signed. In 1995, the current administration eliminated the presumption of harm found in former EO 12356 § 1.3(c) and now requires a showing of harm on a case-by-case basis. EO 12958 § 1.2(a)(4) [Clinton Order]. This is a major shift in policy. Defendants might not view this evolution as prudent policy, but the answer is to direct their concerns to the President, not to ask courts to rewrite an executive order by inserting language the President pointedly deleted.

Pet. App. 25a.

Despite the fact that the district court rejected defendants' "new evidence" and further rejected their attempts to ignore or amend the text of the Clinton Order *pro tanto* through State Department declarations, the district court nonetheless granted reconsideration, inspected the letter *in camera*, and ordered the letter withheld. The district court was "unable to say why" the letter should be withheld, because, in its view, doing so would necessarily cause the harm sought to be avoided. Pet. App. 27a. Nor did the district court cite any of the standards of the Clinton Order

as a basis for reversing itself, Pet. App. 27a-28a, or make any specific findings as to segregability. *Id.*⁹

The United States Court of Appeals for the Ninth Circuit reversed and ordered the letter released. Pet. App. 1a-20a. The court of appeals found, as the district court had, that both of the possible harms discussed in the Sheils and Kennedy Declarations – “damage caused by the act of disclosing a letter between foreign governments, regardless of its particular contents, and damage caused because the letter concerns international extradition proceedings” Pet. App. 10a – were insufficient as a matter of law under the standards established by the Clinton Order. Thus, under the Clinton Order, “it is clear that *all* information exchanged between foreign governments is not exempt from FOIA disclosure, not even all information that another government prefers to keep confidential. . . .” Pet. App. 14a (emphasis in original). As the Ninth Circuit noted, the government was seeking essentially the same analysis as applied under the Reagan Order, arguing that harm to the national security should be presumed without any showing that disclosure of the specific information itself could be injurious. The Clinton Administration however, had “chose[n] to make it easier for the public to view material from foreign governments by eliminating the presumption of harm found in the prior Executive Order, EO 12356 § 1.3(c), and requiring the U.S. government to identify the particular damage that would result from releasing the information.” Pet. App. 14a.

Nor could the Ninth Circuit accept the proposition that extradition communications were categorically exempted from disclosure. The court noted that State had been willing to release the letter prior to British resistance

⁹ The district court simply stated that “there is no portion of [the letter] which could be disclosed without simultaneously disclosing injurious materials.” Pet. App. 27a-28a. This “finding” was, of course, every bit as general and conclusory as the assertions of non-segregability by the government which the district court had previously rejected. See Pet. App. 40a.

and that the British Home Office itself had acknowledged a defense right to extradition letters upon proper request. Pet. App. 15a. This record hardly supported a categorical exception to the Clinton Order for extradition letters.

Finally, the Ninth Circuit rejected the proposition that it should defer to the withholding agencies’ generalized allegations of possible harms. It noted that the burden rests with the government, consistent with well-settled FOIA precedent, to make an initial showing (the *Vaughn* showing) that a particular exemption applies to a particular document before deference is granted. Pet. App. 16a (citing *Rosenfeld v. Department of Justice*, 57 F.3d 803, 807 (9th Cir. 1995)). Under the Clinton Order that initial showing now required some identification or description of particular harm as defined in the order. Pet. App. 16a-17a.

The court of appeals conducted its own *in camera* review and, in doing so, expressly accorded deference to the government’s characterization of the letter and potential harms from release. Pet. App. 17a. The court concluded:

We have reviewed the letter *in camera*, and carefully considered its contents, including the “sensitivity, value, and utility” of the information contained therein. Having done so, we fail to comprehend how disclosing the letter at this time could cause “harm to the national defense or foreign relations of the United States.” The letter is, to use Mr. Kennedy’s term, “innocuous.” Even after giving the act of classification the deference to which it is entitled, we are compelled to conclude that disclosure of the letter pursuant to Weatherhead’s FOIA request could not reasonably “be expected to result in damage to the national security.”

Pet. App. 17a (citations omitted in original).

Judge Silverman dissented. Pet. App. 18a-20a. He found the British insistence on confidentiality and the protocols recited in the Sheils and Kennedy declarations were sufficient to justify withholding the letter. Pet. App.

18a-19a. Judge Silverman's dissent did not identify or describe any specific harm flowing from the content of the letter, or dispute the majority's characterization of the letter as "innocuous." Rehearing and rehearing en banc were denied and this timely petition for certiorari followed.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case did not and, in fact, could not create any conflict with the decisions of any other court of appeals. The Ninth Circuit's decision is the first court of appeals decision to apply FOIA Exemption 1 to the radical changes in the treatment of foreign government communications wrought by the Clinton Order. The Solicitor General's representation to this Court that the change is mere "happenstance," Pet. at 22, and "has no bearing on the conflict," *id.*, is disingenuous at best. That position conflicts with Executive Branch pronouncements contemporaneous with the promulgation of the Clinton Order and with the position taken by the government in the district court that the Reagan Order should be applied and, if applied, would be dispositive.

Nor did the Ninth Circuit fail to accord appropriate deference to the declarations filed in this case. Every circuit requires at least an initial showing under *Vaughn* that the specific document at issue falls within the particular exemption claimed. The Ninth Circuit simply applied this well-settled principle in the context of the Clinton Order's more stringent substantive criteria. The deference the government seeks – district court acquiescence to generalized assertions of possible harms – is inconsistent with the 1974 amendments to FOIA that overruled *Mink*, inconsistent with the requirements of *Vaughn*, and inconsistent with the new dictates of the government's own classification regime.

Nor is the Ninth Circuit's decision "flatly inconsistent," Pet. at 15, with any decisions of this Court. *Department of the Navy v. Egan*, 484 U.S. 518 (1988), held that the

Merit Systems Protection Board did not have jurisdiction over decisions regarding security clearances. *CIA v. Sims*, 471 U.S. 159 (1985), held that the National Security Act of 1947 qualified as a withholding statute under Exemption 3 of FOIA and that medical and psychological professionals conducting counterintelligence activities were protected "intelligence sources" under that Act. It strains credulity to claim that the result below conflicts with either of these decisions. Neither of these precedents speaks to FOIA Exemption 1, let alone Exemption 1 as applied under the Clinton Order. Moreover, because Exemption 1 leaves the Executive Branch in complete control of both the substantive and procedural aspects of classification, dire predictions of encroachment on Executive Branch prerogatives, Pet. at 14-18, ring hollow indeed. If the Clinton Order results in a chilling of diplomatic exchange because the decision to withhold each foreign government communication must be justified by identification and description of a particular harm, Pet. at 14, the remedy lies in amendment of the Executive Order. This Court should decline the invitation to judicially twist and bend both the FOIA and the Clinton Order to achieve the same protection as the Reagan Order. Rather, the Executive, which possesses both expertise in foreign affairs and political accountability, should simply amend its own order and accept whatever political consequences ensue.

The Ninth Circuit's ruling in this case is very specific to the facts of this case, and its decision will not result in any harm to the national security or Executive Branch prerogatives. Despite multiple opportunities to make a showing, the government has been unable to demonstrate that disclosure of the information in the letter at issue will cause any specific harm to national security. Thus, the situation presented here is unusual, because the Clinton Order clearly contemplates that a wholly "innocuous" communication like this one will not be classified. Nothing in the Ninth Circuit's ruling excludes the possibility that truly sensitive national security materials may be treated in a categorical manner even under the Clinton Order.

On the unique facts of this case, the court of appeals' decision requiring disclosure of this letter was a correct application of FOIA Exemption 1 under the terms of the Clinton Order. The court of appeals correctly rejected the argument that government-to-government diplomatic communications are categorically exempt from disclosure. The Clinton Order was promulgated to reverse precisely this type of categorical classification. Its text, structure, and accompanying signing statement all confirm that intent. The Ninth Circuit was also correct to reject the argument that extradition communications as a category should be exempted from disclosure. As the British Home Office noted, such communications are routinely turned over to the defense upon request. They often place limitations on extradition that must be communicated to a state or federal court under the doctrine of specialty and other doctrines. Moreover, as the Ninth Circuit noted, it is difficult for the government to argue that this letter falls into a well-established categorical exception when both Justice and State failed to "recognize" its classified nature until after a FOIA request and after consultation with the British government. Nor can this "innocuous" letter, pertaining to an extradition almost five years ago, satisfy the Clinton Order's stringent definition of harm to the national security.

Finally, this case is particularly unsuited for this Court's review. Even if the Court were wont to examine the issues raised by the Clinton Order's interaction with FOIA Exemption 1, this case presents a poor vehicle for doing so. The *post hoc* classification decision in this case, the apparent willingness of Justice and State to release the letter prior to British protest, and the district court's conclusion that the letter was not exchanged with a promise of confidentiality sufficient to qualify it as "foreign government information," are unique facts that render this case an unsuitable vehicle to address the proper interpretation of the new Clinton Order.

ARGUMENT

A. The Decision Below Does Not Conflict With the Decisions of This Court or Other Courts of Appeal.

In a strained attempt to mold this case to the criteria for the exercise of this Court's certiorari jurisdiction, the government argues that the decision below conflicts with four decisions of other courts of appeals. A conflict, however, is quite simply impossible – all of the cited cases predate the Clinton Order which, as previously discussed at length, *supra* pp. 6-7, substantially increased the burden the Executive Branch placed upon itself to justify the classification of diplomatic communications. Indeed, several of the cases cited by the government rely upon the presumption of harm contained in the Reagan Order – a presumption that was expressly eliminated by the Clinton Order. Even a passing examination of these cases reveals that they apply the same legal principles as did the Ninth Circuit – they simply apply them to very different facts under a very different executive order. Thus, the Ninth Circuit's decision creates no potential for the forum shopping or inconsistent results decried by the Solicitor General. Pet. at 14.

In *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994), the court of appeals addressed a FOIA request for all FBI records pertaining to a Black-nationalist group active in Cleveland in the 1960s and 1970s. The district court applied *Vaughn v. Rosen*, requiring the FBI to provide a description and claim of exemption specific enough to allow judicial evaluation of the claim. *Jones*, 41 F.3d at 242. The court found that the affidavits filed by the FBI "are of the kind that have become accepted practice and they are sufficiently detailed" to satisfy the *Vaughn* standard. *Id.* The court specifically upheld an Exemption 1 claim under the Reagan Order, allowing redaction of "intelligence activities [...] . . . sources, or methods," pursuant to section 1.3(a)(4) of the Reagan Order. Resp. App. 7a. Of course, under the

Reagan Order, as applied in *Jones*, disclosure of "intelligence sources or methods" was *presumed* to cause damage to the national security. Resp. App. 7a. Thus, *Jones* properly accorded deference where the initial specificity required by *Vaughn* had been satisfied in a case involving intelligence sources under an executive order that presumed damage to the national security. *Jones* tells us literally nothing about how the Sixth Circuit would approach a foreign government communication case under the Clinton Order, with no presumption of harm, and with general and conclusory government declarations that do not satisfy *Vaughn*.

McDonnell v. United States, 4 F.3d 1227, 1243 (3d Cir. 1993), is equally unavailing in establishing a conflict among the circuits. *McDonnell* also involved an Exemption 1 claim under the Reagan Order based on intelligence methods – in that case, cryptographic systems. As did the Ninth Circuit here, the Third Circuit in *McDonnell* emphasized the importance to the adversarial process under FOIA of detailed and specific *Vaughn* affidavits. "Thus, when an agency seeks to withhold information, it must provide 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *McDonnell*, 4 F.3d at 1241 (quoting *King v. Department of Justice*, 830 F.2d 210, 218-19 (D.C. Cir. 1987)). Once this required showing under *Vaughn* had been made, the Third Circuit properly deferred to a detailed FBI affidavit discussing the potential harms caused by release of encrypted FBI messages. *McDonnell*, 4 F.3d at 1243-45. The Sixth Circuit's approach in *McDonnell* is indistinguishable from that of the court below. Like the Ninth Circuit (and every other circuit) the *McDonnell* court required an "initial showing" of some specificity under *Vaughn* before deferring to the Executive's classification decision.

Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1993), upheld the State Department's refusal to release communications from foreign governments regarding

Armenian terrorism. The opinion explicitly relies in part upon the Reagan Order's presumption that the release of foreign government communications would harm the national security. See *Krikorian*, 984 F.2d at 465 & n.4 (discussing "reciprocal confidentiality" of diplomatic communications and citing presumption of harm from release under section 1.3(c) of the Reagan Order). We are left to speculate as to how the D.C. Circuit's decision in *Krikorian* "conflicts" in any sense with the Ninth Circuit's decision under a new and different executive order without such a presumption.

Finally, *Bowers v. Department of Justice*, 930 F.2d 350 (4th Cir.), cert. denied, 502 U.S. 911 (1991), involved a request by a journalist for the FBI files of a former Soviet diplomat and a Soviet national who emigrated to the United States. Again, the court specifically relied upon the presumption of harm in the Reagan Order in denying disclosure of foreign government information. *Id.* at 358. The court also noted that it had been provided with "more than 480 pages of declarations" which provided "a very detailed and particularized account of why the withheld information qualified under the exemptions of § 552(b)." *Id.* at 357.¹⁰

As the above discussion makes clear, there is no conflict in approach or analysis between the Ninth Circuit's decision in this case and the decisions of other courts of appeals. Pursuant to *Vaughn* and consistent with the

¹⁰ Nor do *Miller v. Department of State*, 779 F.2d 1378 (8th Cir. 1985), or *Doherty v. Department of Justice*, 775 F.2d 49 (2d Cir. 1985), conflict with the decision below. Both cases are decided under the Reagan Order, and both cases deferred to the Executive's classification decision only after an adequately specific claim of exemption had been made. *Miller*, 779 F.2d at 1387 ("[T]he government cannot adequately carry its burden through 'barren assertions' that the document is exempt.") (citations omitted); *Doherty*, 775 F.2d at 51 (The affidavits "describe with reasonable specificity the information withheld and the justifications for nondisclosure.") (citation omitted).

FOIA's requirements that the government bear the burden of proof on exemptions, every circuit requires an "initial showing" of some specificity that a particular document falls within the terms of Exemption 1.¹¹ No circuit defers to the kind of general and conclusory declarations such as those filed in this case, even under the Reagan Order. Such deference would read the 1974 amendments out of the statute and reinstate the *Mink* regime.

The government's claim that the decision below conflicts with this Court's decisions in *Egan* and *Sims* is even more attenuated. *Egan* found that the statutory authority of the Merit Systems Protection Board did not extend to review of agency decisions to revoke security clearances. In so holding, the Court applied the canon of construction that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citations omitted). Because the Board had no express grant of authority to review security clearance revocation, the Court found that Congress had conferred no such authority. *Id.* at 531-32.

Egan is wholly inapposite here. In FOIA, Congress has clearly and unambiguously given the federal courts jurisdiction to review *de novo* whether matters are "properly classified" pursuant to executive order. 5 U.S.C. § 552(b)(1)(B). The Executive controls entirely the content of his own orders. No affront to Article II prerogatives is presented by requiring the Executive to adhere to standards of his own creation in the area of foreign affairs.

¹¹ For a discussion of the history of Exemption 1, see *supra* p. 3. Given its centrality to FOIA exemption litigation, it is passing strange that *Vaughn* is nowhere mentioned in the petition for certiorari. The fact that under *Vaughn*, federal courts have required an "initial showing" of some specificity before deferring to agency claims of exemption for over 25 years would seem extremely relevant to this Court's evaluation of the Ninth Circuit's requirement of an "initial showing" in this case.

Nor does this Court's decision in *Sims* require review of the decision below. *Sims* was an Exemption 3 case applying the National Security Act to intelligence sources. The court held that the "broad sweep" of the Act allowed the Director of the CIA to protect all sources of intelligence for the Agency, whether or not they are foreign sources or otherwise confidential or nonpublic. *Sims*, 471 U.S. at 169-70. No Exemption 1 claim was raised or litigated in *Sims*. See *id.* at 187-88 & n.4 (Marshall, J., dissenting).

Respondent does not quarrel with the general principle endorsed in *Egan* and *Sims* that the Executive Branch is entitled to deference from the other two Branches concerning its decisions in the areas of foreign affairs and national security. The point here is that the Executive has made such a decision in the Clinton Order – he has revised classification policy to emphasize disclosure and de-emphasize secrecy. It is that judgment that the Judicial Branch is required to enforce under FOIA Exemption 1, not the *post hoc* rationalizations of State Department personnel who may disagree with that judgment.

While the Ninth Circuit is the first court to apply the Clinton Order under FOIA Exemption 1, several courts have noted that it embodies a conscious decision by the Executive Branch to substantially reduce the secrecy accorded to government information and increase its disclosure. See, e.g., *Summers v. Department of Justice*, 140 F.3d 1077, 1082 (D.C. Cir. 1998) ("The newer order, Executive Order No. 12,958, differs considerably from its predecessor, Executive Order No. 12,356. Significantly, the newer order is less restrictive, reflecting what it refers to as 'dramatic changes' in national security concerns in the late 1980s following the United States' victory in the Cold War."); *Halpern v. FBI*, No. 98-6035, 1999 U.S. App. LEXIS 13700 (2d Cir. June 22, 1999), at *18 (noting "more liberal standards of Executive Order 12,958"). Indeed, in both this case and *Halpern*, the Department of Justice actively litigated for application of the more restrictive standards of the Reagan Order. See Pet. App. 26a-27a, *Halpern*, at

*18-*19.¹² It is baffling that the government now represents to this Court that the changes wrought by the new order are mere "happenstance," Pet. at 22, immaterial to the outcome of Exemption 1 litigation.

B. The Ninth Circuit Correctly Interpreted and Applied the New and Significantly More Stringent Requirements For Classification in the Clinton Executive Order.

The court of appeals quite properly rejected the rule of blanket deference urged upon it by the government. The thrust of the government's legal arguments below, its State Department declarations, and its position before this Court is that foreign government communications must be categorically protected to ensure full and candid exchange with foreign governments. Pet. App. 53a (Sheils Declaration); Pet. App. 57a (Kennedy Declaration); Pet. at 14, 24-25. Thus, the government seeks to resurrect, through State Department declarations and "serious separation-of-powers concerns," Pet. at 17-18, the presumption of protection for government-to-government communications it expressly cast aside in 1995.

The Ninth Circuit would not take the bait and neither should this Court. The change in executive orders could not be clearer nor more deliberate. As previously outlined at length, *supra* pp. 6-7, a presumption of harm was eliminated and in its place the Clinton Order erects a requirement that specific harm be identified and described. The structure of the order makes crystal clear that breach of a promise of confidentiality alone cannot, as a matter of law, satisfy the harm requirement. An expectation of confidentiality is a necessary predicate to a finding that information qualifies as "foreign government information" eligible

¹² See also Defendants' Reply Memorandum in Support of Motion to Alter or Amend Judgment Pursuant to Rule 59(e), at 8-9 & n.2 (citing presumption in Reagan Order).

for classification. If a showing of expectation of confidentiality is also sufficient for classification, then section 1.2(a)(4) of the Clinton Order is rendered surplusage in the case of "foreign government information" and the Clinton Order is at least as restrictive as the Reagan Order. The Ninth Circuit was undoubtedly correct in rejecting this circular line of reasoning. The government's position – that a backdrop of diplomatic confidentiality, or even a particular government's *post hoc* insistence on confidentiality, is sufficient ground for classification under the Clinton Order – is untenable.¹³

The Ninth Circuit was also correct in rejecting the government's argument that extradition communications constitute a particularly sensitive subset of diplomatic communications for which a presumption of harm should apply. Such an approach is inconsistent with the Clinton Order's elimination of the presumption of protection for all diplomatic communications. Compare Reagan Order § 1.3(b) Resp. App. 7a with Clinton Order § 1.2(a)(4), Pet. App. 68a. President Clinton's signing statement accompanying the new executive order makes clear that "[c]lassifiers will have to justify what they classify" and "we will no longer presumptively classify certain categories of information, whether or not the *specific information* otherwise meets the strict criteria for classification." Resp. App. 27a (emphasis added). The President's statement comports

¹³ Nor is the State Department's (or the Solicitor General's) interpretation of the Clinton Order entitled to any deference. See Pet. at 23 & n.11 (citing *Udall v. Tallman*, 380 U.S. 1, 4 (1965)). *Udall* involved a long-standing construction which was a matter of public record. *Id.* By contrast, Justice and State's position here was taken for the first time in litigation and is not entitled to any deference. See *Martin v. OSHRC*, 499 U.S. 144, 156 (1991).

with the text of the order and makes clear that a categorical or presumptive approach to diplomatic communications based on expectations of confidentiality is precisely – precisely – what the order was meant to eliminate.¹⁴

Furthermore, extradition documents are uniquely poor candidates for a categorical exception to disclosure. Criminal defendants routinely have access to, and rely upon, foreign government documents to enforce important doctrines of international extradition law in state and federal courts. For example, “[a]s a matter of international comity, the doctrine of specialty prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite.” *United States v. Khan*, 993 F.2d 1368, 1373 (9th Cir. 1993) (citations omitted); see also *United States v. Rauscher*, 119 U.S. 407, 419-21 (1886). Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII(1), 28 U.S.T. 227, 233, T.I.A.S. No. 8468 (recognizing doctrine of specialty). The specialty doctrine thus focuses exclusively upon the terms and conditions of a foreign government’s grant of the United States’ extradition request. United States courts routinely enforce these “diplomatic” limitations on extradition. See, e.g., *Khan*, 993 F.2d at 1373-75 (prohibiting prosecution where Pakistani extradition documents did not unambiguously permit such prosecution). Access to

¹⁴ As a statement of intent and purpose by the unitary and exclusive source of the Clinton Order itself, the President’s signing statement is entitled to significantly more interpretive weight in this context than in the context of legislation. At a minimum, it should be accorded the same weight as a preamble to legislation. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1995); *Price v. Forrest*, 173 U.S. 410, 427 (1899). In addition to the signing statement, the preamble to the Clinton Order speaks in the same terms of increased access and more stringent criteria for classification. Pet. App. 26a-28a. As contemporaneous statements of presidential purpose, both the signing statement and preamble should inform judicial interpretation of the text of the order.

extradition documents is thus often necessary to enforce treaties as they impact the prosecution of foreign nationals. Indeed, in this very case, the British government informed the United States that Great Britain did not have an analogous crime for the firearms charges in the indictment against Croft. This information was conveyed to the trial judge in this case, and that charge was severed and not tried.¹⁵

In addition, the First Amendment dictates that preliminary hearings in criminal cases are presumptively open to the public. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). As this Court has noted, public access plays a significant positive role in the functioning of preliminary criminal proceedings, by “enhanc[ing] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 508. This principle applies with equal force to extradition hearings and foreign extradition documents. See *In re Romeo*, No. 87-0808RC, 1987 U.S. Dist. LEXIS 12595 (D. Mass. May 1, 1987). Not only does the public have an interest in open extradition proceedings within the context of the criminal justice system; “the extent to which and the manner in which the Executive Branch adheres to its treaty obligations is a matter of legitimate public concern.” *Id.* at *9 (citing *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986)). Thus, unlike many diplomatic communications, extradition communications are often destined for release to the courts and criminal defendants and this fact is known to (and desired by) the governments that exchange them. Thus, the Ninth Circuit correctly rejected a categorical rule exempting extradition communications from disclosure under the FOIA.

¹⁵ If this information regarding “specialty” was contained in the July 28, 1994, letter at issue in this case, there can be no argument that, at a minimum, the portion of the letter addressing specialty must be disclosed.

Contrary to the discussion in the petition, Pet. at 26-29, the Ninth Circuit nowhere held that only harm flowing from the disclosure of the content of information, as opposed to harm from the act of disclosure itself, is cognizable under the Clinton Order. Rather, the court of appeals expressly left open the question whether a categorical approach is forbidden for all categories of classifiable material under the Clinton Order: "While we do not preclude the possibility that the government might be able in some circumstance to establish an inherently damaging category of information, we need not decide that question now, because the government did not meet its burden of establishing the justification for such a category in this case." Pet. App. 14a-15a. Thus, the Ninth Circuit's opinion stands only for the narrow proposition that the release of "government-to-government communications" or "extradition communications" cannot categorically be presumed to cause harm to the national security. Given the changes wrought by the Clinton Order, this holding is undoubtedly correct. Nowhere does the Ninth Circuit purport to limit all cognizable harms to those flowing exclusively from disclosure of the contents of a particular document.¹⁶

¹⁶ Although this broader issue was not passed upon by the Ninth Circuit, and is therefore not properly presented by this case, the district court did squarely hold, we believe correctly, that the Clinton Order restricts classification harm to damage from the disclosure of the content of information. The Clinton Order eliminated the "mosaic" theory of classification by deleting that portion of the Reagan Order that permitted classification based on harm from unauthorized disclosure of information "either by itself or in the context of other information." Resp. App. 7a. Compare Reagan Order § 1.3(b), Resp. App. 7a. with Clinton Order § 1.2(a)(4), Pet. App. 68a. Harm from exogenous context, therefore, can no longer provide grounds for classification. Harm must flow from the disclosure of "information, to include the sensitivity, value, and utility of that information." Pet. App. 68a. While "sensitivity, value, and utility," are not exclusive, they nonetheless must be read in the

Finally, the Ninth Circuit held that nothing extraordinary about the content or context of this document justified withholding it under Exemption 1: "We have reviewed the letter *in camera*, and carefully considered its contents, including the 'sensitivity, value, and utility' of the information contained therein. The letter is, to use Mr. Kennedy's term, 'innocuous.'" Pet. App. 17a (quoting Clinton Order § 1.1(l)), Pet. App. 67a-68a. The letter pertains to a criminal case now final for several years.¹⁷ The fact that the British wish the letter to remain confidential is plainly not sufficient, in and of itself, to satisfy the government's burden under the Clinton Order. This Court's review is clearly not warranted simply to examine or correct the conclusion of the Ninth Circuit based upon its *in camera* review of one document.

context of the doctrine of *eiusdem generis*. See, e.g., *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84 (1990); *Cleveland v. United States*, 329 U.S. 14, 18 (1946). All three of these listed "sources" of harm relate exclusively to the content of the information. Moreover, the President's signing statement states unequivocally that the new order focuses on "whether or not the specific information otherwise meets the strict standards for classification." Resp. App. 27a (emphasis added). Still, while the Solicitor General is quite mistaken in his reading of the Clinton Order, resolution of this issue is not necessary to this case and therefore must await further litigation applying FOIA Exemption 1 to the Clinton Order.

¹⁷ We note that even Judge Silverman, the dissenting judge below, who also viewed the letter *in camera*, could not see any harm in disclosure. "I am not a diplomat, I don't know the intricacies of the geopolitical situation at the time, but I looked at the letter today and, honestly looking at it, I can't tell what it is that makes it top secret." Transcript of Oral Argument, *Weatherhead v. United States*, No. 96-36260 (9th Cir. Apr. 8, 1998), at 34 (Statement of Judge Silverman).

C. This Case Constitutes a Poor Vehicle To Address the Issues Raised in the Petition.

The unique facts of this case make it a poor vehicle for the announcement of any general principles of FOIA law or to address the interaction of the new Clinton Order with FOIA Exemption 1. First, the district court found that this letter did not qualify as "foreign government information" because it was not exchanged with an expectation of confidentiality. Pet. App. 33a ("There is no showing in this record of a contemporaneous expectation of confidentiality with respect to the letter."). Second, the case involves extradition communications, which are *sui generis* in the field of diplomatic exchange in that they are often intended (or required) to be revealed to the courts of requesting and extraditing countries. Third, it appears that a portion of this letter has already been revealed to a federal district court in Oregon to effectuate the British assertion of the doctrine of specialty. Finally, the fact that this document was not classified until almost a year after a FOIA request was made, may color the analysis. See Pet. App. 76a (placing certain additional restrictions on classification decisions made after receipt of a FOIA request).

CONCLUSION

Because the Ninth Circuit is the first court of appeals in the nation to apply the Clinton Order under FOIA Exemption 1, because it was undoubtedly correct in refusing to erect categorical presumptions for diplomatic communications under the new Clinton Order, and because the facts of this case present a poor vehicle for review, the petition for certiorari should be denied.

Respectfully submitted,

CHARLES J. COOPER*
ANDREW G. MCBRIDE
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

*Counsel of Record

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n1 Editorial Note: The page numbers in the original text have been changed to those of this publication

Executiver [sic] Order National Security Information

This Order prescribes a uniform system for classifying, declassifying, and safeguarding national security information. It recognizes that it is essential that the public be informed concerning the activities of its Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under this Order unless its disclosure reasonably could be expected to cause damage to the national security.

Now, by the authority vested in me as President by the Constitution and laws of the United States of America, it is hereby ordered as follows:

Part 1 Original Classification

Section 1.1 Classification Levels.

(a) National security information (hereinafter "classified information") shall be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

(b) Except as otherwise provided by statute, no other terms shall be used to identify classified information.

(c) If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority, who shall make this determination within thirty (30) days. If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a

determination by an original classification authority, who shall make this determination within thirty (30) days.

Sec. 1.2 Classification Authority.

(a) Top Secret. The authority to classify information originally as Top Secret may be exercise [sic] only by:

- (1) the President;
- (2) agency heads and officials designated by the President in the Federal Register; and
- (3) officials delegated this authority pursuant to Section 1.2(d).

(b) Secret. The authority to classify information originally as Secret may be exercised only by:

- (1) agency heads and officials designated by the President in the Federal Register;
- (2) officials with original Top Secret classification authority; and
- (3) officials delegated such authority pursuant to Section 1.2(d).

(c) Confidential. The authority to classify information originally as Confidential may be exercised only by:

- (1) agency heads and officials designated by the President in the Federal Register;
- (2) officials with original Top Secret or Secret classification authority; and
- (3) officials delegated such authority pursuant to Section 1.2(d).

(d) Delegation of Original Classification Authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this Order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) Original Top Secret classification authority may be delegated only by the President; an agency head or official designated pursuant to Section 1.2(a)(2); and the senior official designated under Section 5.3(a)(1), provided that official has been delegated original Top Secret classification authority by the agency head.

(3) Original Secret classification authority may be delegated only by the President; an agency head or official designated pursuant to Sections 1.2(a)(2) and 1.2(b)(1); an official with original Top Secret classification authority; and the senior official designated under Section 5.3(a)(1), provided that official has been delegated original Secret classification authority by the agency head.

(4) Original Confidential classification authority may be delegated only by the President; an agency head or official designated pursuant to Section 1.2(a)(2), 1.2(b)(1) and 1.2(c)(1); an official with original Top Secret classification authority; and the senior official designated under Section 5.3(a)(1), provided that official has been delegated original classification authority by the agency head.

(5) Each delegation of original classification authority shall be in writing and the authority shall not be

re delegated except as provided in this Order. It shall identify the official delegated the authority by name or position title. Delegated classification authority includes the authority to classify information at the level granted and lower levels of classification.

(e) **Exceptional Cases.** When an employee, contractor, licensee, or grantee of an agency that does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this Order and its implementing directives. The information shall be transmitted promptly as provided under this Order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within thirty (30) days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommendations, to that agency for a classification determination.

Sec. 1.3 Classification Categories.

(a) Information shall be considered for classification if it concerns:

- (1) military plans, weapons, or operations;
- (2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

- (3) foreign government information;
- (4) intelligence activities (including special activities), or intelligence sources or methods;
- (5) foreign relations or foreign activities of the United States;
- (6) scientific, technological, or economic matters relating to the national security;
- (7) United States Government programs for safeguarding nuclear materials of facilities;
- (8) cryptology;
- (9) a confidential source; or
- (10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President. Any determination made under this subsection shall be reported promptly to the Director of the Information Security Oversight Office.

(b) Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

(c) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security.

(d) Information classified in accordance with Section 1.3 shall not be declassified automatically as a result of any unofficial publication or inadvertent or unauthorized disclosure in the United States or abroad of identical or similar information.

Sec. 1.4. Duration of Classification.

(a) Information shall be classified as long as required by national security considerations. When it can be determined, a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified.

(b) Automatic declassification determinations under predecessor orders shall remain valid unless the classification is extended by an authorized official of the originating agency. These extensions may be by individual documents or categories of information. The agency shall be responsible for notifying holders of the information of such extensions.

(c) Information classified under predecessor orders and marked for declassification review shall remain classified until reviewed for declassification under the provisions of this Order.

Sec. 1.5 Identification and Markings.

(a) At the time of original classification, the following information shall be shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved, unless this information itself would reveal a confidential source or relationship not otherwise evident in the document or information:

(1) one of the three classification levels defined in Section 1.1;

(2) the identity of the original classification authority if other than the person whose name appears as the approving or signing official;

(3) the agency and office of origin; and

(4) the date or event for declassification, or the notation "Originating Agency's Determination Required."

(b) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are not classified. Agency heads may, for good cause, grant and revoke waivers of this requirement for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

(c) Marking designations implementing the provisions of this Order, including abbreviations, shall conform to the standards prescribed in implementing directives issued by the Information Security Oversight Office.

(d) Foreign government information shall either retain its original classification or be assigned a United States classification that shall ensure a degree of protection at least equivalent to that required by the entity that furnished the information.

(e) Information assigned a level of classification under predecessor orders shall be considered as classified at that level of classification despite the omission of other

required markings. Omitted markings may be inserted on a document by the officials specified in Section 3.1(b).

Sec. 1.6 Limitations on Classification.

(a) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

(b) Basic scientific research information not clearly related to the national security may not be classified.

(c) The President or an agency head or official designated under Sections 1.2(a)(2), 1.2(b)(1), or 1.2(c)(1) may reclassify information previously declassified and disclosed if it is determined in writing that (1) the information requires protection in the interest of national security; and (2) the information may reasonably be recovered. These reclassification actions shall be reported promptly to the Director of the Information Security Oversight Office.

(d) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of this Order (Section 3.4) if such classification meets the requirements of this Order and is accomplished personally and on a document-by-document basis by the agency head, the deputy agency head, the senior agency official designated under Section 5.3(a)(1), or an official with original Top Secret classification authority.

Part 2 Derivative Classification

Sec. 2.1 Use of Derivative Classification.

(a) Derivative classification is (1) the determination that information is in substance the same as information currently classified, and (2) the application of the same classification markings. Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) observe and respect original classification decisions; and

(2) carry forward to any newly created documents any assigned authorized markings. The declassification date or event that provides the longest period of classification shall be used for documents classified on the basis of multiple sources.

Sec. 2.2 Classification Guides.

(a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official designated under Section 5.3(a)(1); and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agency heads may, for good cause, grant and revoke waivers of the requirement to prepare classification guides for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

Part 3. Declassification and Downgrading

Sec. 3.1 Declassification Authority.

(a) Information shall be declassified or downgraded as soon as national security considerations permit. Agencies shall coordinate their review of classified information with other agencies that have a direct interest in the subject matter. Information that continues to meet the classification requirements prescribed by Section 1.3 despite the passage of time will continue to be protected in accordance with this Order.

(b) Information shall be declassified or downgraded by the official who authorized the original classification, if that official is still serving in the same position; the originator's successor; a supervisory official of either; or officials delegated such authority in writing by the agency head or the senior agency official designated pursuant to Section 5.3(a)(1).

(c) If the Director of the Information Security Oversight Office determines that information is classified in violation of this Order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may

be appealed to the National Security Council. The information shall remain classified, pending a prompt decision on the appeal.

(d) The provisions of this Section shall also apply to agencies that, under the terms of this Order, do not have original classification authority, but that had such authority under predecessor orders.

Sec. 3.2 Transferred Information.

(a) In the case of classified information transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this Order.

(b) In the case of classified information that is not officially transferred as described in Section 3.2(a), but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such information shall be deemed to be the originating agency for purposes of this Order. Such information may be declassified or downgraded by the agency in possession after consultation with any other agency that has an interest in the subject matter of the information.

(c) Classified information accessioned into the National Archives of the United States shall be declassified or downgraded by the Archivist of the United States in accordance with this order, the directives of the Information Security Oversight office, and agency guidelines.

Sec. 3.3 Systematic Review for Declassification.

(a) The Archivist of the United States shall, in accordance with procedures and timeframes prescribed in the Information Security Oversight Office's directives implementing this Order, systematically review for declassification or downgrading (1) classified records accessioned into the National Archives of the United States, and (2) classified presidential papers or records under the Archivist's control. Such information shall be reviewed by the Archivist for declassification or downgrading [sic] in accordance with systematic review guidelines that shall be provided by the head of the agency that originated the information, or in the case of foreign government information, by the Director of the Information Security Oversight Office in consultation with interested agency heads.

(b) Agency heads may conduct internal systematic review programs for classified information originated by their agencies contained in records determined by the Archivist to be permanently valuable but that have not been accessioned into the National Archives of the United States.

(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified cryptologic [sic] information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

Sec. 3.4 Mandatory Review for Declassification.

(a) Except as provided in Section 3.4(b), all information classified under this Order or predecessor orders shall be subject to a review for declassification by the originating agency, if:

(1) the request is made by a United States citizen or permanent resident alien, a federal agency, or a State or local government; and

(2) the request describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort.

(b) Information originated by a President, the White House Staff, by committees, commissions, or boards appointed by the President, or others specifically providing advice and counsel to a President or acting on behalf of a President is exempted from the provisions of Section 3.4(a). The Archivist of the United States shall have the authority to review, downgrade and declassify information under the control of the Administrator of General Services or the Archivist pursuant to sections 2107, 2107 note, or 2203 of title 44, United States Code. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective presidential papers or records. Any decision by the Archivist may be appealed to the Director of the Information Security Oversight Office. Agencies with primary subject matter interest shall be notified promptly of the Director's decision on such appeals and may further

appeal to the National Security Council. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information no longer requiring protection under this Order. They shall release this information unless withholding is otherwise authorized under applicable law.

(d) Agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They shall also provide a means for administratively appealing a denial of a mandatory review request.

(e) The Secretary of Defense shall develop special procedures for the review of cryptologic information, and the Director of Central Intelligence shall develop special procedures for the review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods, after consultation with affected agencies. The Archivist shall develop special procedures for the review of information accessioned into the National Archives of the United States.

(f) In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this Order:

(1) An agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order.

(2) When an agency receives any request for documents in its custody that were classified by another agency, it shall refer copies of the request and the requested documents to the originating agency for processing, and may, after consultation with the originating agency, inform the requester of the referral. In cases in which the originating agency determines in writing that a response under Section 3.4(f)(1) is required, the referring agency shall respond to the requester in accordance with that Section.

Part 4 Safeguarding

Sec. 4.1 General Restrictions on Access.

(a) A person is eligible for access to classified information provided that a determination of trustworthiness has been made by agency heads or designated officials and provided that such access is essential to the accomplishment of lawful and authorized Government purposes.

(b) Controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed only under conditions that will provide adequate protection and prevent access by unauthorized persons.

(c) Classified information shall not be disseminated outside the executive branch except under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch.

(d) Except as provided by directives issued by the President through the National Security Council, classified information originating in one agency may not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. For purposes of this section, the Department of Defense shall be considered one agency.

Sec. 4.2 Special Access Programs.

(a) Agency heads designated pursuant to Section 1.2(a) may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or predecessor orders. Such programs may be created or continued only at the written direction of these agency heads. For special access programs pertaining to intelligence activities (including special activities but not including military operational, strategic and tactical programs), or intelligence sources or methods, this function will be exercised by the Director of Central Intelligence.

(b) Each agency head shall establish and maintain a system of accounting for special access programs. The Director of the Information Security Oversight Office, consistent with the provisions of Section 5.2(b)(4), shall have non-delegable access to all such accountings.

Sec. 4.3 Access by Historical Researchers and Former Presidential Appointees.

(a) The requirement in Section 4.1(a) that access to classified information may be granted only as is essential

to the accomplishment of authorized and lawful Government purposes may be waived as provided in Section 4.3(b) for persons who:

- (1) are engaged in historical research projects, or
- (2) previously have occupied policy-making positions to which they were appointed by the President.

(b) Waivers under Section 4.3(a) may be granted only if the originating agency:

(1) determines in writing that access is consistent with the interest of national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this Order; and

(3) limits the access granted to former presidential appointees to items that the person originated, reviewed, signed, or received while serving as a presidential appointee.

Part 5 Implementation and Review

Sec. 5.1 Policy Direction.

(a) The National Security Council shall provide overall policy direction for the information security program.

(b) The Administrator of General Services shall be responsible for implementing and monitoring the program established pursuant to this Order. The Administrator shall delegate the implementation and monitorship

functions of this program to the Director of the Information Security Oversight Office.

Sec. 5.2 Information Security Oversight Office.

(a) The Information Security Oversight Office shall have a full-time Director appointed by the Administrator of General Services subject to approval by the President. The Director shall have the authority to appoint a staff for the office.

(b) The Director shall:

(1) develop, in consultation with the agencies, and promulgate, subject to the approval of the National Security Council, directives for the implementation of this Order, which shall be binding on the agencies;

(2) oversee agency actions to ensure compliance with this Order and implementing directives;

(3) review all agency implementing regulations and agency guidelines for systematic declassification review. The Director shall require any regulation or guideline to be changed if it is not consistent with this Order or implementing directives. Any such decision by the Director may be appealed to the National Security Council. The agency regulation or guideline shall remain in effect pending a prompt decision on the appeal;

(4) have the authority to conduct on-site reviews of the information security program of each agency that generates or [sic] handles classified information and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill the Director's responsibilities. If these reports, inspections, or

access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior official designated under Section 5.3(a)(1) may deny access. The Director may appeal denials to the National Security Council. The denial of access shall remain in effect pending a prompt decision on the appeal;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend presidential approval;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the information security program;

(7) have the authority to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program;

(8) report at least annually to the President through the National Security Council on the implementation of this Order; and

(9) have the authority to convene and chair inter-agency meetings to discuss matters pertaining to the information security program.

Sec. 5.3 General Responsibilities.

Agencies that originate or handle classified information shall:

(a) designate a senior agency official to direct and administer its information security program, which shall include an active oversight and security education program to ensure effective implementation of this Order;

(b) promulgate implementing regulations. Any unclassified regulations that establish agency information security policy shall be published in the Federal Register to the extent that these regulations affect members of the public;

(c) Establish procedures to prevent unnecessary access to classified information, including procedures that (i) require that a demonstrable need for access to classified information is established before initiating administrative clearance procedures, and (ii) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs; and

(d) develop special contingency plans for the protection of classified information used in or near hostile or potentially hostile areas.

Sec. 5.4 Sanctions.

(a) If the Director of the Information Security Oversight office finds that a violation of the Order or its implementing directives may have occurred, the Director shall make a report to the head of the agency or to the senior official designated under Section 5.3(a)(1) so that corrective steps, if appropriate, may be taken.

(b) officers and employees of the United States Government, and its contractors, licensees, and grantees shall be subject to appropriate sanctions if they:

(1) knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) knowingly and willfully classify or continue the classification of information in violation of this Order or any implementing directive; or

(3) knowingly and willfully violate any other provision of this Order or implementing directive.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) Each agency head or the senior official designated under Section 5.3(a)(1) shall ensure that appropriate and prompt corrective action is taken whenever a violation under Section 5.4(b) occurs. Either shall ensure that the Director of the Information Security Oversight Office is promptly notified whenever a violation under Section 5.4 (b)(1) or (2) occurs.

Part 6 General Provisions

Sec. 6.1 Definitions.

(a) "Agency" has the meaning provided at 5 U.S.C. 552(e).

(b) "Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

(c) "National security information" means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(d) "Foreign government information" means:

(1) information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence; or

(2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

(e) "National security" means the national defense or foreign relations of the United States.

(f) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.

(g) "Original classification" means an initial determination that information requires, in the interest of

national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required.

Sec. 6.2 General.

(a) Nothing in this Order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight office, shall render an interpretation of this Order with respect to any question arising in the course of its administration.

(c) Nothing in this Order limits the protection afforded any information by other provisions of law.

(d) Executive Order No. 12065 of June 28, 1978, as amended, is revoked as of the effective date of this Order.

(e) This order shall become effective on August 1, 1982.

Ronald Reagan

The White House, April 2, 1982.

[Filed with the Office of the Federal Register, 2:52 p.m., April 2, 1982]

LANGUAGE: ENGLISH

67TH DOCUMENT of Level 2 printed in FULL format.

Public Papers of the Presidents

April 17, 1995

CITE: 31 Weekly Comp. Pres. Doc. 633

LENGTH: 616 words

HEADLINE: Statement on Signing the Executive Order
on Classified National Security Information

BODY:

Today I have signed an Executive order reforming the Government's system of secrecy. The order will lift the veil on millions of existing documents, keep a great many future documents from ever being classified, and still maintain necessary controls over information that legitimately needs to be guarded in the interests of national security.

In issuing this order, I am seeking to bring the system for classifying, safeguarding, and declassifying national security information into line with our vision of American democracy in the post-Cold War world.

This order strikes an appropriate balance. On the one hand, it will sharply reduce the permitted level of secrecy within our Government, making available to the American people and posterity most documents of permanent historical value that were maintained in secrecy until now.

On the other, the order enables us to safeguard the information that we must hold in confidence to protect our Nation and our citizens. We must continue to protect information that is critical to the pursuit of our national

security interests. There are some categories of information – for example, the war plans we may employ or the identities of clandestine human assets – that must remain protected.

This order also will reduce the sizable costs of secrecy – the tangible costs of needlessly guarding documents and the intangible costs of depriving ourselves of the fullest possible flow of information.

This order establishes many firsts: Classifiers will have to justify what they classify; employees will be encouraged and expected to challenge improper classification and protected from retribution for doing so; and large-scale declassification won't be dependent on the availability of individuals to conduct a line-by-line review. Rather, we will automatically declassify hundreds of millions of pages of information that were classified in the past 50 years.

Similarly, we will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. We will not permit the reclassification of information after it has been declassified and disclosed under proper authority. We will authorize agency heads to balance the public interest in disclosure against the national security interest in making declassification decisions. And, we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification. At the same time, however, we will maintain every necessary safeguard and procedure to

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assure that appropriately classified information is fully protected.

Taken together, these reforms will greatly reduce the amount of information that we classify in the first place and the amount that remains classified. Perhaps most important, the reforms will create a classification system that Americans can trust to protect our national security in a reasonable, limited, and cost-effective manner.

In keeping with my goals and commitments, this order was drafted in an unprecedented environment of openness. We held open hearings and benefitted from the recommendations of interested Committees of Congress and nongovernmental organizations, groups, businesses, and individuals. The order I have signed today is stronger because of the advice we received from so many sources. I thank all those who have helped to establish this new system as a model for protecting our national security within the framework of a Government of, by, and for the people.

William J. Clinton

The White House, April 17, 1995.

LANGUAGE: ENGLISH

LOAD-DATE: May 16, 1995

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Case Control No. 9502026
Requester: Weatherhead

Ms. Rachel Webb
British Embassy
3100 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Ms. Webb:

We have received a request under a provision of U.S. law for release of the enclosed document.

Before complying with this request, we would appreciate the concurrence of your government in the release of the document. Should your government wish to release only a part of this material, please indicate with brackets the portions you wish withheld.

In responding to our letter, please refer to the case control number shown above and return the document to us. Thank you for your cooperation.

Sincerely,

Joseph P. Leahy
Liaison Officer
Office of Freedom of
Information, Privacy, and
Classification Review

Enclosure:

One document; total pages two.

KENNEDY DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 1

30a

[LOGO]

British Embassy
Washington

3100 Massachusetts Ave., N.W.
Washington D.C. 20006-3600

Telephone: (202)

Facsimile: (202) 898-4241
898-4255

Mr Joseph P Leahy
Liaison Officer
Office of Freedom of Information
Privacy & Classification Review
State Department

Dear Mr. Leahy,

**DECLASSIFICATION REQUEST: CASE CONTROL
NUMBER 9502026**

I am writing in response to your letter dated 4 August. The Foreign and Commonwealth Office have reviewed the attached document and after careful consideration, are *unable to agree to its release*. The Home Office have advised that the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence. In this particular case, requests from representatives of the defendants for sight of the letter have already been refused on grounds of confidentiality.

Our Library and Records Department would also be concerned about the precedent set by releasing even part of the letter since any such development would quickly

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become common knowledge amongst lawyers dealing with extradition matters.

Yours Sincerely,

Rachel Webb

Rachel Webb

KENNEDY DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 2

AUG 10 1999

OFFICE OF THE CLERK

No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

No. 98-1904

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A divided panel of the Ninth Circuit ordered the release of a classified diplomatic communication based solely on the majority's conclusion that the letter "appear[s]" to be "innocuous." Pet. App. 13a, 17a. In so holding, the court of appeals refused to accord any deference to the declarations of the responsible Executive Branch officials, which explained how disclosure of the document *would* damage the United States' foreign relations, both with a critical ally and more broadly. In particular, the declarations explained in detail how the very act of disclosure of a letter that was sent in confidence by the British government and that pertains to a diplomatically sensitive extradition case¹ would imperil on-

¹ See, e.g., Owen Bowcott, *Extra-special Relationship*, *The Guardian*, July 5, 1994, at T18 (describing the 124-year history of British/ U.S. cooperation in extradition matters; attorney claims the Home Secretary is "fearful of upsetting the Americans maybe because he wants IRA suspects held in the States sent back here"; "[e]xtradition appeals have the quality of transforming themselves into political issues"); Christopher Reed, *IRA "Quid Pro Quo" Deal Suspected*, *The Guardian*, Apr. 5, 1994, at 4 ("It will not have escaped the Home Secretary's notice in considering the extradition to America of Sally Croft and Susan Hagan * * * that four

going and future exchanges with the British government on many matters, including in the vitally important area of law enforcement cooperation. See *id.* at 52a-54a, 56a-58a. The Ninth Circuit's disregard of the Executive's judgment concerning the harm to foreign relations that disclosure will entail conflicts with decisions of this Court and of other courts of appeals and ignores the Executive Order's plain language. Rather than answer those arguments, respondent relies on changes in the governing Executive Order that are not involved in this case; attempts to distinguish the decisions of other courts of appeals and of this Court on grounds that have no bearing on their conflict with the decision below; and strains to rationalize the Ninth Circuit's substitution of its own foreign policy judgment for that of the Executive Branch.

1. The court of appeals' holding that the Executive Branch must "justify" judicial deference to its foreign relations judgments through an unspecified "initial showing," see Pet. App. 16a, conflicts with the decisions of numerous other courts of appeals, all of which accord the views of Executive officials "substantial weight" at the outset, and with decisions of this Court affording the "utmost deference" to the Executive's judgments about the need for secrecy in foreign relations. See Pet. 13-18. Respondent's efforts to avoid those conflicts fail.

a. Respondent observes (Br. in Opp. 19-24) that none of the cases cited as conflicting with the Ninth Circuit's denial of deference arose under the current Executive Order (No. 12,958; see Pet. App. 65a-111a). That is true, but irrelevant for a number of reasons. First, at least one court of appeals and numerous district courts have also hewed to the "substantial weight" standard of deference in cases arising under the current Executive Order, without requiring any "initial showing" to "justify" deference.²

IRA prison escapers in California are the subject of intense—and so far unsuccessful—attempts to extradite them to Britain.”).

² See, e.g., *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (“Mindful that courts have little expertise in * * * international diplo-

Second, the present case was decided on the basis that the classified letter concerns the “foreign relations or foreign activities of the United States.” See Pet. App. 7a. Nothing in the new Executive Order altered the manner in which such information is classified, see § 1.5(d); Exec. Order No. 12,356, § 1.3(a)(5) (3 C.F.R. 169 (1983)), and respondent does not contend otherwise. While respondent discusses at length (see Br. in Opp. 16-17, 19-21, 24-25) the current Executive Order's elimination of a presumption in the prior Order that the release of “foreign government information” would damage the United States' foreign relations (see Exec. Order No. 12,356, § 1.3(b) and (c)), the court of appeals did not address the letter's status as “foreign government information.” A change in a classification category that did not form the basis of the court's decision thus cannot explain the departure from other courts' rulings.

Third, even were the change in the Executive Order's treatment of “foreign government information” relevant, the elimination of an across-the-board presumption that disclosure will *always* hurt the national security plainly does not mean that disclosure will *never* do so; it simply means that the responsible Executive official must determine in each case whether an expectation of confidentiality existed and whether breaching it would harm our diplomatic relations. The declarations here did precisely that. See Pet. 5-7; see also Pet. 11. Indeed, the elimination of the presumption magnifies, rather than diminishes, the Ninth Circuit's departure from precedent. The court of appeals did not simply disregard a generalized presumption; it refused to defer to the expert and individualized judgments of Executive Branch officials focused on the precise disclosure issue before the court.

macy * * *, we are in no position to dismiss the CIA's facially reasonable concerns”; “government affidavits regarding harm * * * [are] entitled to ‘substantial weight.’”); *Students Against Genocide v. Department of State*, No. Civ. A96-667, 1998 WL 699074, at *5 (D.D.C. Aug. 24, 1998); *Billington v. Department of Justice*, 11 F. Supp. 2d 45, 54 (D.D.C. 1998).

Fourth, and most fundamentally, nothing in the current Executive Order changed the relationship between the courts and Executive officials in this context or invited courts to evaluate de novo the foreign relations implications of document disclosures. Where the Ninth Circuit went astray was in disregarding the constitutionally mandated rule that courts give "substantial weight" to the Executive Branch's foreign policy judgments and "unique insights" about the harm disclosure would cause (see Pet. 18 & n.7). That rule is an enduring one, spanning multiple decades and numerous Executive Orders. See *id.* at 15-17. For that reason, the fact that the decisions of other courts of appeals arose under the prior Order or involved different forms of national security information is of no moment. For example, although *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994), arose under an Executive Order that presumed harm from the particular type of disclosure, the Sixth Circuit held that "a reviewing court should accord 'substantial weight' to the agency's affidavits regarding classified information," *id.* at 244, without ever mentioning that presumption. The assignment of "substantial weight" to Executive Branch judgments and affidavits in *McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993); *Miller v. United States Dep't of State*, 779 F.2d 1378, 1387 (8th Cir. 1985); and *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985), were likewise made without any reference to the presumption of harm.³

b. Respondent's insistence (Br. in Opp. 19-21) that the Ninth Circuit's denial of deference can be reconciled with other courts' rulings by viewing the decision below as a

³ Similarly, in *Krikorian v. Department of State*, 984 F.2d 461 (1993), the District of Columbia Circuit accorded "substantial weight to an agency's affidavit" about the impact of disclosure on "reciprocal confidentiality" before it referenced the presumption of harm, and cited in support of its deference only cases that predated the Reagan Executive Order's creation of such a presumption. *Id.* at 464-465; accord *Bowers v. United States Dep't of Justice*, 930 F.2d 350, 357-358 (4th Cir.), cert. denied, 502 U.S. 911 (1991).

straightforward application of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), is simply wrong. As an initial matter, it is "passing strange" (Br. in Opp. 22 n.11) that, if this were a *Vaughn* case, the court of appeals never cited *Vaughn* in its opinion, and respondent never cited *Vaughn* in his appellate briefs.

The obvious reason *Vaughn* is inapplicable is that respondent conceded and the court agreed that the letter was properly categorized as information concerning the "foreign relations or foreign activities of the United States," see Pet. App. 7a, and the State Department declarations plainly "identif[ied] or describe[d] the damage" to national security that would result from disclosure. See Exec. Order No. 12,958, § 1.2(a). Mr. Kennedy, in particular, attested that (1) the British government had an expectation of confidentiality in the precise document at issue,⁴ (2) the United States recognized that expectation as reasonable, and (3) disclosure of the letter over the British government's repeated objections would imperil the United States' international law enforcement interests, ongoing cooperation in extradition matters with Britain, and "our ability to conduct the foreign relations of the U.S." Pet. App. 56a-58a.

Thus, the only issue before the court of appeals was the legal question whether the harm that the declarations described—harm arising from the very act of breaching a foreign government's legitimate expectation of confidentiality—constituted a form of harm to the national security cognizable under the Executive Order. The Ninth

⁴ Respondent's suggestion (Br. in Opp. 10) that the British government was willing to release the document to the defense ignores that government's repeated statements to the contrary. See Pet. 10 n.4; Resp. App. 30a ("In this particular case, requests from representatives of the defendants for sight of the letter have already been refused on grounds of confidentiality."). In any event, the possibility in other circumstances that a document might be made available (perhaps under a protective order) to a party making a particularized showing of need for it in a judicial proceeding scarcely suggests that it is thereby rendered freely available to the public at large under FOIA, 5 U.S.C. 552(a).

Circuit pointedly refused to consider that harm to the national security. See Pet. App. 13a (faulting the government for “focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations * * * even if the content ‘appear[s] to be innocuous’”). As a result, the court denied any deference to the Executive Branch’s explanation of the damage to foreign relations that would ensue from disclosure because it was not “justified” under the court’s (rather than the Executive Order’s or the Executive Branch’s) vision of the relevant harm to national security. That is not a *Vaughn* problem; it is a substitution-of-judgment problem. The Executive Branch, unlike respondent and the Ninth Circuit, has concluded that it is important for this Nation to honor its commitment to protect the confidential relationship. “Great nations, like great men, should keep their word.” *Heckler v. Matthews*, 465 U.S. 728, 748 (1984).

2. a. The court of appeals’ and respondent’s refusal to recognize that the Executive Order protects against harm to foreign relations arising from the very act of disclosure is fundamentally wrong and contrary to the rulings of this Court and other circuits. See Pet. 21-27. Respondent, attempts to elide the conflict by arguing that the “structure” of the current Executive Order excludes harm arising from the act of disclosure. Br. in Opp. 24. It is implausible in the extreme to suppose that the President would order such a wholesale abrogation of the longstanding practice of diplomatic confidentiality, and in fact the text of the Executive Order says exactly the opposite. The change in Orders therefore provides no basis for distinguishing the decisions of other circuits or of this Court.⁵

⁵ Under the current Executive Order, other courts have specifically deferred to Executive claims of harm arising from the breach of a promise of confidentiality to a foreign government. *Students Against Genocide*, 1998 WL 699074, at *11; *Billington*, 11 F. Supp. 2d at 58 (“disclosure could reasonably be expected to cause serious damage to the national security as it would violate the FBI’s promise of confidentiality”).

Both the prior and the current Executive Orders make “damage to the national security” the touchstone for classification. See Exec. Order No. 12,958, § 1.2(4); Exec. Order No. 12,356, § 1.1. The current Executive Order, unlike its predecessor, provides a definition of “damage to the national security” the terms of which plainly embrace harm arising from the “disclosure of information.” Exec. Order No. 12,958, § 1.1(l). Furthermore, the Executive Order separately provides that, if “the release” of classified information will “damage relations between the United States and a foreign government,” the document falls within the extraordinary category of information that is exempt from the general requirement of declassification after ten years. See § 1.6(d)(6). That special exception confirms that the damage to foreign relations resulting from release of a document is an independent component of the “[d]amage to the national security” covered by the Executive Order.⁶ Respondent’s contrary approach, moreover, would lead to the bizarre conclusion that a foreign government’s threat to terminate negotiations with the United States on a sensitive matter, or to refuse to afford reciprocal protection for the confidences of the United States if its own confidences are not preserved, would not “harm * * * [the] foreign relations of the United

⁶ Respondent is simply wrong in asserting (Br. in Opp. 5, 28 n.6) that the current Executive Order eliminated the mosaic approach to classification, see Exec. Order No. 12,958, § 1.8(e); *Billington*, 11 F. Supp. 2d at 54, and thus implicitly precludes discerning harm from beyond the four corners of the particular document. Furthermore, the court of appeals ignored this Court’s direction in *Udall v. Tallman*, 380 U.S. 1, 4 (1965), that courts defer to the Executive’s reasonable interpretation of an Executive Order. Respondent’s extraordinary claim that the Executive “is not entitled to any deference” under *Udall* (Br. in Opp. 25 n.13) is meritless. The Executive’s position in this case was first manifested when the FOIA request was denied, not when the litigation commenced, and that position was then elaborated upon in declarations filed with the court, as FOIA and *Vaughn* specifically contemplate. Accordingly, the Executive’s interpretation of the Executive Order merits great deference. Cf. *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996).

States" (*id.* § 1.1(l)).⁷ In international law enforcement, in particular, preserving the trust and ongoing cooperation of foreign governments is a distinct foreign policy objective, separate and apart from any individual criminal matter.

b. Respondent (Br. in Opp. 24-28), like the court of appeals (Pet. App. 14a-15a), contends that reliance on harm arising from the act of disclosure itself is proper only if either *all* information exchanged between governments or *all* extradition information is exempt from disclosure. Nothing in the text of the Executive Order or of FOIA supports such a rule of categorical treatment. See Pet. 27-28. Rather, when Executive officials demonstrate in an individual case (as they have here) that the disclosure of a particular document would harm the United States' relations with a foreign government, that harm is sufficient for classification under the Executive Order, and thus for withholding under FOIA.

Accordingly, respondent's claim (Br. in Opp. 26-27) that "extradition documents" are unsuited for "categorical" exemption misunderstands our position. To the extent he argues that some documents relating to an extradition are subject to disclosure in criminal prosecutions, we agree. But to the extent respondent suggests that the extradition context diminishes the traditional confidentiality of diplomatic communications, he is fundamentally mistaken. Criminal defendants do not "routinely have access to" (*id.* at 26) foreign government communications in extradition cases. While defendants generally do obtain a foreign government's public extradition documents (such as the extradition decision, warrants, and hearing transcripts), that is a far cry from the notion that they have routine access to the underlying inter-governmental communications. Quite the opposite is true. The United States does not release to the public most foreign government communications in extradi-

⁷ Compare *CIA v. Sims*, 471 U.S. 159, 175 (1985) (if confidential sources "come to think that the [United States] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the [United States] in the first place"); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984).

tion cases. Such communications may contain sensitive law-enforcement information regarding, for example, crimes committed, the location of fugitives, criminal investigative sources and methods, investigative or prosecutorial strategies, and security concerns. Candid exchanges of that and other vital information would not occur if foreign governments and their law enforcement officials feared public disclosure of their statements.⁸

The doctrine of specialty to which respondent refers (Br. in Opp. 26-27) is no exception. When an issue arises in a criminal prosecution concerning the foreign government's consent to the charging of a particular offense, the court routinely considers publicly available documents or asks the government to consult with the foreign government and then report back on whether prosecution of a particular count may proceed.⁹ We are aware of no case in which, as part of that process, the underlying confidential exchanges between the United States and a foreign government were filed with the court or publicly disclosed.¹⁰

⁸ *In re Romeo*, No. 87-0808RC, 1987 WL 10373 (D. Mass. May 1, 1987) (cited at Br. in Opp. 27), offers respondent no help. While the court held that an extradition hearing should be open to the public, it "[could] find no cases or history which indicate a tradition of accessibility to extradition documents." *Id.* at *3.

⁹ See, e.g., *SEC v. Eurobond Exchange, Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994); *United States v. Khan*, 993 F.2d 1368, 1373-1374 (9th Cir. 1993). We have been informed that, in the case of respondent's client, a distinct surrender warrant from the British government identified the charges on which the defendants could be prosecuted. Respondent offers no support for his assertion (Br. in Opp. 30) that the confidential letter at issue here was partly revealed to the district court to address the firearms charge, and we have been informed that no such disclosure was made.

¹⁰ Respondent is mistaken in asserting (Br. in Opp. 30) that the State Department's letter of inquiry to the British Embassy regarding respondent's FOIA request (see Resp. App. 29a) establishes that the United States did not consider the extradition letter respondent seeks to be confidential. Given the ambiguous wording of that initial letter of inquiry, the British government's firm response, the State Department's declarations that it understood the communication to be made in confidence, the

3. Respondent contends (Br. in Opp. 17) that certiorari is not warranted because the President can rewrite his Executive Order. But, as explained above, the problem with the Ninth Circuit's ruling is not the Executive's failure to follow the terms of its own Order. The State Department's declarations did precisely what the Executive Order requires: they described the harm to the United States' foreign relations that would result from disclosure. The problem, rather, is the Ninth Circuit's dramatic departure from long-established principles of deference to Executive officials' identification and prediction of harm to the national security—principles that FOIA was intended to respect. The President should be able to structure classification procedures for the Executive Branch in a manner that he determines best promotes the public interest and national welfare. He should not have to tailor his Order to protect against or to respond to every judicial misapplication of its terms or departure from settled principles.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

AUGUST 1999

inquiry letter's authorship by an individual lacking classification authority (see Exec. Order No. 12,958, § 1.4), and the lack of evidence that the inquiry letter was anything other than a routine form letter (see U.S. Dep't of State, Office of Freedom of Information, Privacy and Classification Review, *FPC/CDR Procedures Manual* 106 & Form FG-1 (1995)), that initial letter of inquiry does not undermine the subsequent, considered classification judgment. Likewise, respondent errs in contending (Br. in Opp. 30) that the Executive's delay in formally classifying the letter diminishes the significance of the Ninth Circuit's errors. The Executive Order expressly provides for the classification of material after a FOIA request is received. § 1.8(d). Furthermore, respondent does not allege, nor could he, that, prior to the FOIA request, the letter was publicly available or was treated as a non-privileged document; the letter, after all, pertained to an ongoing criminal investigation.

(6)

Supreme Court, U.S.

FILED

OCT 22 1999

No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF JUSTICE; AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioners

CHARLES J. COOPER
ANDREW G. MCBRIDE
COOPER, CARVIN &
ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

Counsel of Record
for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: MAY 27, 1999
CERTIORARI GRANTED: SEPTEMBER 10, 1999

62PP

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON (SPOK-YAK)

Civil No.: 95-CS-519

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
UNITED STATES DEPARTMENT OF STATE, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/14/94	2	SUMMONS/RETURN OF SERVICE executed upon defendant USA, de- fendant DOJ, defendant Dept of State (as) [Entry date 12/15/95]
11/17/95	1	COMPLAINT For Injunction To Produce Records Under Freedom of Information Act (Summons(es) is- sued) Fee-status: pd Receipt #: 34186 (as) [Entry date 11/20/95] * * * * *
1/19/96	3	ANSWER by defendant to complaint for injunction (as)

2/16/96 4 Plaintiff's MOTION For Summary Judgment (ech)
* * * * *

3/29/96 10 ORDER by Judge Fred L. Van Sickle (It is ordered that the motion for summary judgment would be GRANTED [4-1]; if any particular form od [sic] Order is required to effectuate this ruling, pltf may submit a proposed Order in due course) (cc: all counsel) (as)
* * * * *

4/9/96 12 Request by defendant for immediate hearing (as)
* * * * *

4/12/96 15 JUDGMENT (cc: all counsel) COB-142-92 (as)

4/12/96 16 MOTION by defendant to alter or amend judgment pursuant to Rule 59 (e) and to file document IN CAMERA or, in the alternative to stay pending appeal (as) [Entry date 04/15/96]
* * * * *

9/9/96 23 ORDER by Judge Fred L. Van Sickle granting in part and denying in part as moot, motion to alter or amend judgment pursuant to Rule 59(e) [16-1], motion to file document IN CAMERA [16-2], motion to stay pending appeal [16-3] (cc: all counsel) (pw) [Entry date 09/12/96]

10/16/96 24 MOTION by plaintiff to set aside judgment FRCP 60(b)(6) (pw)
* * * * *

11/25/96 33 Notice of appeal by plaintiff Les Weatherhead from Dist. Court decision Order filed 9/9/96 [23-1] (cc: all counsel and 9CCA) (vr) [Entry date 11/26/96]
* * * * *

12/2/96 35 ORDER by Judge Fred L. Van Sickle denying motion to set aside judgment FRCP 60(b)(6) [24-1] (cc: all counsel) (pw)

12/9/96 36 Notification by Circuit Court of Appellate Docket Number [33-1] 9CCA Number: 96-36260 Date appeal filed 11/25/96 (vr)
* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 96-36260

LESLIE R. WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF JUSTICE;
US DEPT OF STATE, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
12/5/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 12/5/96; appellee's designation of RT is due 12/16/96; appellant shall order transcript by 12/26/96; court reporter shall file transcript in DC by 1/27/97; certificate of record shall be filed by 2/3/97; appellant's opening brief is due 3/13/97; appellees' brief is due 4/14/97; appellants' reply brief is due 4/28/97; [96-36260] (sf)
	* * * * *
3/24/98	Filed order (Deputy Clerk: eu) The Government is requested to furnish copies of

the withheld letter to the panel under appropriate security precautions as soon as possible before the date of schedule oral argument, 4/8/98. (PHONED OUT AT 3:55 P.M.) [96-36260] (gail)

4/8/98 ARGUED AND SUBMITTED TO Procter R. HUG, Stephen R. REINHARDT, Barry G. SILVERMAN [96-36260] (jmk)

10/6/98 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Procter R. HUG, author; Stephen R. REINHARDT; Barry G. SILVERMAN, dissenting.) FILED AND ENTERED JUDGMENT. [96-36260] (jjf)

* * * * *

2/26/99 Filed order (Procter R. HUG, Stephen R. REINHARDT, Barry G. SILVERMAN): The panel has voted to deny Aples' pet for rhrq and to reject the sugg for rhrq en banc. . . . The pet for rhrq is denied and the sugg for rhrq en banc is rejected. (For complete text see order.) [3569422-1] [96-36260] (gail)

3/4/99 Filed aples' motion for a stay of the mandate: decl of Strobe Talbott [96-36260] served on 3/2/99 (PANEL)([3628026] (gail)

3/9/99 Filed AMENDED order (Procter R. HUG, Stephen R. REINHARDT, Barry G. SILVERMAN): Chief Judge Hug and

Judge Reinhardt voted to deny Aples' pet for rhrq and to reject the sugg for rhrq en banc. Judge Silverman voted to grant the pet for rhrq and to accept the sugg for rhrq en banc. The full ct was advised of the sugg for rhrq en banc. An active judge requested a vote on whether to rehear the matter en banc. [T]he matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. FRAP 35. The pet for rhrq is denied and the sugg for rhrq en banc is rejected. [3569422-1] [96-36260] (gail)

3/10/99 Filed order (Procter R. HUG): The mtn to stay the mandate is GRANTED. [3628026-1] [96-36260] (gail)

6/3/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1904 filed on 5/27/99. [96-36260] (gal)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Civil No. CS-95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS

COMPLAINT FOR INJUNCTION
TO PRODUCE RECORDS UNDER
FREEDOM OF INFORMATION ACT

[Filed: Nov. 17, 1995]

Comes now plaintiff Leslie R. Weatherhead, through his attorney Gregory J. Workland, Esq., and for cause of action against defendants alleges as follows:

I. JURISDICTION AND VENUE

1.1 This action is brought under 5 U.S.C. §552(a) seeking an injunction compelling defendants to cease withholding and to deliver information to plaintiff.

1.2 Venue is proper in the Eastern District of Washington under 5 U.S.C. §552(a)(4)(B) in that plaintiff has at all material times resided in this district.

II. PARTIES

2.1 Plaintiff is an individual citizen of the United States residing in Spokane, Washington.

2.2 Defendants United States Department of Justice and United States Department of State are federal administrative agencies acting as official arms of the United States Government, and as such are subject to the requirements of 5 U.S.C. §552.

III. FACTS

3.1 On November 29, 1994, plaintiff requested that defendants, or either of them, produce a document specifically identified by plaintiff. Plaintiff offered to pay reasonable costs of retrieval. See attachments A and B to this complaint, incorporated by reference herein.

3.2 Defendants acknowledged that they had identified and located the document requested by plaintiff, but failed and refused to deliver a copy as requested.

3.3 At no time did defendants, or either of them, attempt to justify their failure and refusal to deliver the requested document in any way. They have simply refused to do their statutory duty without even pretense of lawful authority.

3.4 Plaintiff has exhausted his administrative remedies in his efforts to retrieve a copy of the requested document. More than a year has passed since his initial request, and nearly sixty days have passed since defendants advised that plaintiff was entitled to sue (though defendants still indicate they are thinking about

whether to do their duty under the statute). See Attachments C-K, incorporated by reference herein.

3.5 Defendants' refusal to deliver the information requested, which defendants have never even attempted to justify under any asserted exemption under the Freedom of Information Act, 5 U.S.C. §552, is contrary to law. Pursuant to the statute plaintiff is entitled to an injunction forbidding unlawful withholding and compelling production of the requested document.

WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT IN HIS FAVOR AS FOLLOWS:

1. For a preliminary and permanent injunction requiring defendant to cease withholding production of the document requested and compelling its prompt production to plaintiff;
2. For an award of Plaintiff's costs and reasonable attorneys' fees herein; and
3. For such other and further relief as to the court may seem equitable in the circumstances.

Dated this 14th day of November, 1995.

By

/s/ GREGORY J. WORKLAND
GREGORY J. WORKLAND
Attorney for Plaintiff

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

U.S. BANK BUILDING
 422 WEST RIVERSIDE, SUITE 1100
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other office address omitted]

November 29, 1994

Director, Office of Freedom
 of Information Privacy and
 Classification Review
 Department of State
 2201 C Street N.W.
 Washington, D.C. 20520-1512

Re: FOIA Request

Dear Sir or Madam:

This will request a copy of a letter from the British home office to George Procter of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan.

EXHIBIT A

Naturally, I will pay reasonable charges for location, copying and mailing of this document. If you have any questions, kindly call me at (509) 624-5265, or fax me at (509) 458-2717.

Very truly yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE, P.S.

By /s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW:sls

LRW/9411.029

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

U.S. BANK BUILDING
 422 WEST RIVERSIDE, SUITE 1100
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other office address omitted]

November 29, 1994

Freedom of Information Act Officer
 Office of Public Affairs
 Department of Justice
 Tenth and Constitution Avenue N.W.
 Washington, D.C. 20530

Re: FOIA Request

Dear Sir or Madam:

This will request a copy of a letter from the British home office to George Procter of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan.

EXHIBIT B

Naturally, I will pay reasonable charges for location, copying and mailing of this document. If you have any questions, kindly call me at (509) 624-5265, or fax me at (509) 458-2717.

Very truly yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE, P.S.

By
 /s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW:sls

LRW/9411.030

[Seal omitted]

U.S. Department of State
Washington, D.C. 20520

Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
Attorneys & Counselors
U.S. Bank Building
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Dec. 19, 1994

Request Number 9405059

Dear Sir/Madam:

Thank you for your letter of November 29, 1994 in which you requested:

a copy of a letter dated July 28, 1994 to George Procter of the Department of Justice from the British home office related to the extradition of Sally Croft and Susan Hagan.

The following information may explain certain boundaries of the Department's search for documents in response to Freedom of Information Act requests.

The cut-off date for retrieving documents is the date of the requester's letter. Accordingly, no documents which originated after the date of your letter will be retrieved.

EXHIBIT C

Only existing documents are subject to the Freedom of Information Act. The Act does not provide for the creation of documents, compilation of data, preparation of lists, analyses of events, etc.

- [x] We have begun to process your request based upon the information provided in your letter. As soon as responsive material has been retrieved and reviewed, we will notify you.
- [] Before we can proceed, we need the additional information requested in the marked paragraph(s) in *Section A and/or B*. (We attempted to reach you by phone on _____ to discuss the need for this information). We will hold your request open for ninety (90) days from the date of this letter pending receipt of the requested information.
- [x] Please review the fee information provided in *Section C*.
- [x] *SECTION C*

The Freedom of Information Act requires agencies to collect fees to recover the costs of processing requests, unless a fee waiver has been granted or the charges fall below a certain amount. The following marked paragraphs address these issues.
 - [] Your request for a fee waiver has been granted.
 - [] Your request for a fee waiver has been denied. Should you wish to appeal this decision, you may write to: Peter Sheils, Chief, Requests Manage-

ment Division, at the address indicated below. Your appeal should address the points listed in the enclosed sheet entitled "Requests for Fee Waivers."

- [x] You have stated your willingness to pay the fees associated with the processing of this request. (ALL).
- [x] Based upon the information that you have provided, this request will be processed in accordance with the fee schedule designated for the following category of requesters. (See Subsection 171.14 of the enclosed Rules and Regulations).
 - [] commercial use requesters
 - [] educational institutions
 - [] non-commercial scientific institutions
 - [] representatives of the news media
 - [x] all other requesters

The Department's search and review fees are:

Administrative/Clerical	\$8.00/hour
Professional	\$17.00/hour
Executive	\$30.00/hour

- [] You have indicated your inclusion in a category different from the one above. Please provide the information asked on the attached sheet entitled "Requester Categories" to substantiate your inclusion in a particular category of requester.

- [] Before I can make a decision about your request for a fee waiver, I will need additional information as noted in the attached sheet entitled "Requests for Fee Waivers."
- [] Your request for a fee waiver is being reviewed. We will notify you as soon as a decision has been made.
- [] I will not be able to make a determination about your fee waiver request until the processing of your case has been completed. At that time an independent evaluation of the releasable material will be made.
- [] Initial inquiries indicate that the total costs for processing this case will be below the minimum amount charged in your requester category. Accordingly, your request will be processed a [sic] no cost to you. Please note that this determination pertains only to this case.
- [] We will notify you of the costs incurred in processing your request as soon as the search and review actions have been completed.

- [x] Please be advised that the Department of Justice may also have information of the nature you seek. You may write them directly at the following address; Mr. Richard Huff: Co-Director; Room 933-Office of Legal Policy; Department of Justice; Washington, D.C. 20530.

If you have any questions with respect to the processing of your request, you may write to the Office of Freedom of Information, Privacy and Classification Review, Room 1512, Department of State, 2201 C Street, N.W., Washington, D.C. 20520-1512, or telephone: (202) 647-6070. Please be sure to refer to your request number in all correspondence about this case.

Sincerely,

/s/ REGINA L. EDWARDS for
Rosemary Melendy, Chief
Initial Processing and Control Branch
Office of Freedom of Information,
Privacy and Classification Review

Enclosure(s):

____ Rules and Regulations
____ Request for Fee Waiver
____ Requester Categories

[Seal omitted]

U.S. Department of Justice

Washington, D.C. 20530

JAN 31 1995

CRM-950056F

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
1100 U.S. Bank Building
422 West Riverside Avenue
Spokane, WA 99201-0390

Dear Mr. Weatherhead:

The Justice Management Division has referred your request of November 29, 1994, to the Criminal Division for our review and response to you. Your request has been assigned file number 950056F. Please refer to this number in any future correspondence with this Unit.

We will conduct a search to determine what records (if any) we have that are within the scope of your request. Once we have completed our search, we will

EXHIBIT D

notify you as to our disposition of your request. Please note that this search will encompass only Criminal Division records.

Sincerely,

/s/ L.J. JOACHIM
LINDA J. JOACHIM,
Attorney-Advisor
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

[Seal omitted]

United States Department of State
Washington, D.C. 20520

MAY 4 1995

Leslie Weatherhead
Witherspoon, Kelley, Davenport & Toole
U.S. Bank Building
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

RE: Freedom of Information Act Request No.
9405059 Information concerning a letter from
the British home office to George Proctor of
the Department of Justice

Dear Ms. Weatherhead:

Pursuant to your request, this office initiated a search of the records of the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence.

The responsibilities of the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence include bringing legal considerations to bear in formulating and carrying out U.S. foreign policy and in the administration of the Department and the Foreign Service. The Office of the Assistant Legal Adviser for Law Enforcement and Intelligence is responsible for general legal advice on the enforcement of international laws and

EXHIBIT E

regulations and on litigation relating to intelligence issues.

After a thorough search of the records of the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence by professional employees familiar with this record system and its organization, no documents responsive to your request were located.

I regret that the Department's response is not more positive. Should you have any additional information which would assist us in conducting further searches of Department records systems, please let us know within 60 days of the date of this letter, and we will be pleased to resume the processing of your request. Send additional information to: Office of Freedom of Information, Privacy and Classification Review, Room 1512, Department of State, Washington, D.C. 20520-1512.

The D.C. Circuit Court of Appeals, in *Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir. 1990), ruled that a "no record" response constitutes an adverse determination, thereby requiring an agency to give appeal rights to the requester.

Accordingly, our decision that the Department does not have any records responsive to your request may be appealed within 60 days of the date of this letter. Appeals should be addressed to: the Assistant Secretary for Public Affairs, Department of State, Washington, D.C. 20520-6800. A copy of the Department's appeal procedures is enclosed. Although I am fully satisfied that our record search has been thorough and complete, I did want to be sure that you are aware of this court decision.

The Freedom of Information Act permits Federal agencies to recover the direct costs of searching for and duplicating records that have been requested for non-commercial use. However, processing costs for your case are below the amount for which we charge fees, so your request has been processed at no cost to you.

Please refer to the request number shown above in all inquiries concerning this request.

Sincerely,

/s/ FRANK M. MACHAK
Frank M. Machak
Director
Office of Freedom of Information
Privacy and Classification Review

Enclosure:
As stated.

58116 *Federal Register*/Vol. 45, No. 171/Tuesday,
September 2, 1980
Rules and Regulations

Subpart G - Appeals Procedures

171.60 Appeal of denial of access to records

(a) Review of an initial denial of access to a record under the Freedom of Information Act (5 USC 552), the Privacy Act of 1974 (5 USC 552a), or Executive Order 12065 may be requested by the individual who submitted the initial request for access. The request for review (hereinafter referred to as the appeal) must be in writing and should be sent by certified mail to the Assistant Secretary for Public Affairs, Chairman, Appeals Review Panels, Department of State, 2201 C Street, N.W., Washington, D.C. 20520. The appeal should be received within 60 days of the date of the receipt by the appellant of the Department's refusal to grant access to a record in whole or in part.

(b) The time for decision on the appeal begins on the date the appeal is received by the Chairman, Appeals Review Panels. The appeal of a denial of access to records shall include any documentation, information and statements to support the individual's request for access and to refute the use of the exemption(s) cited in the Department's justification concerning the denial of access.

(c) The Chairman of the Appeals Panels or her/his designee and at least two other members chosen by her/him from a list of senior officers designated for this purpose by the various bureaus of the Department shall constitute a panel to consider and decide the appeal. There shall be a written

record of the reasons for the final determination. The final determination will be made within 30 working days for Executive Order and Privacy Act appeals, and within 20 working days (excluding Saturdays, Sundays, and holidays) for FOIA appeals. For good cause shown, the Chairman of the Appeals Review Panels may extend such determination beyond the 30-day period in Privacy Act cases.

(d) The Chairman shall then notify the requester in writing of the panel's decision to grant access and of the Department's regulations concerning access.

(e) When the final decision of the Panel is to refuse to grant an individual access to a record, the Chairman of the Panel shall advise the individual in writing:

(1) of the refusal to grant the appeal and the reasons therefor including the exemptions of the Freedom of Information Act, the Privacy Act of 1974, and/or Executive Order 12065 under which access is denied;

(2) of her/his right to seek judicial review of the Department's decision, where applicable.

[Seal omitted]

**U.S. Department of Justice
Criminal Division**

Washington, D.C. 20530

MAY 17 1995

CRM-950056F

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
U.S. Bank Building
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0390

Dear Mr. Weatherhead:

This is in response to your Freedom of Information Act request of November 29, 1994 for access to "... a copy of a letter from the British home office to George Proctor of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan".

Our search of Criminal Division files has located a copy of this document. Inasmuch as this document was created by a foreign government, we have referred it to

EXHIBIT F

the Department of State (which processes such records) for that office's review and direct response to you.

Sincerely,

/s/ MARSHALL R. WILLIAMS
Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING
 422 WEST RIVERSIDE
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other addresses omitted]

May 31, 1995

Frank M. Machak, Director
 Office of Freedom of Information
 Privacy and Classification Review
 United States Department of State
 Washington, D.C. 20520

Re: *Freedom of Information Act Request No.*
9405059

Dear Mr. Machak:

I have your letter reporting a failure to locate the document which I had requested. Since receiving your letter, I received a copy of a letter from Mr. Marshall Williams of the Department of Justice. I enclose a copy of his letter. Mr. Williams reports that his agency did find the letter but is turning it over to your agency for determination as to whether it may be released to me.

EXHIBIT G

I would respectfully request that you expedite consideration of my request. I am very troubled by the Department of Justice's delay of nearly six months in the face of a statutory requirement that a response be made within 15 days. I realize that your agency is not responsible for the inexcusable delay at the Justice Department, but I respectfully request that you take it into account in expediting my request for a copy of the document requested.

In view of the changed circumstances created by Mr. Williams' forwarding the document to your agency, I am unclear as to whether I need to appeal your previous determination that the document was not located. If I need to to obtain the letter or to obtain expedited review as requested above, please treat this letter as a notice of appeal.

Very truly yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE

By /s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW: gs
 Enclosure

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING
 422 WEST RIVERSIDE
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other addresses omitted]

May 31, 1995

Marshall R. Williams, Chief
 Freedom of Information/Privacy Act Unit
 Office of Enforcement Operations
 Criminal Division
 U.S. Department of Justice
 Washington, D.C. 20530

Dear Mr. Williams:

I have your letter of May 17, 1995. In your letter you report that you located the document I asked for in my request of November 29, 1994.

Your letter contains no explanation as to why it took six months to respond to a request to which, according to statute, I was entitled to a response within 15 days. Second, your letter indicates that the document is in your possession, however you did not forward the

EXHIBIT H

document to me. Your letter contains no suggestion that the letter is in any way subject to any exemption from disclosure under the Freedom of Information Act. Instead, you have chosen to further delay a response to my request by forwarding the document to another agency.

Your letter does not indicate whether your agency offers any quasi-appellate review of responses to Freedom of Information Act requests. If it does, please treat this letter as a formal notice of appeal, and request for such review, as I desire to exhaust my administrative remedies before bringing suit against the Department for its violations of the Act.

Respectfully yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE, P.S.

By

/s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW: gs

[Seal omitted]

U.S. Department of Justice

Washington, D.C. 20530

July 03 1995

CRM-950056F

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
1100 U.S. Bank Building
422 West Riverside
Spokane, Washington 99201-0390

Dear Mr. Weatherhead:

This is in response to your letter dated May 31, 1995.

Your November 29, 1994 request was not received by the Criminal Division until January 18, 1995. Pursuant to Department regulations, documents originated by a foreign government are referred to the Department of

EXHIBIT I

State for processing. We have forwarded your letter to the Office of Information and Privacy which handles all appeals.

Sincerely,

/s/ **MARSHALL R. WILLIAMS**
Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

[Seal omitted]

**U.S. Department of Justice
Office of Information and Privacy**

Telephone: (202) 514-3642 Washington, D.C. 20530

July 7, 1995

Ms. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport
& Toole
1100 U.S. Bank Building
422 West Riverside
Spokane, WA 99201-0390

Re: Denial of 5/17/95

Dear Ms. Weatherhead:

This is to advise you that your administrative appeal from the action of the Criminal Division on your request for information from the files of the Department of Justice was received by this Office on June 30, 1995.

The Office of Information and Privacy, which has the responsibility of adjudicating such appeals, has a substantial backlog of pending appeals received prior to yours. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of

EXHIBIT J

receipt. Your appeal has been assigned number 95-1614. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. The necessity of this delay is regretted and your continuing courtesy is appreciated.

Sincerely,

/s/ DREMA A. HANSHAW
DREMA A. HANSHAW
Paralegal Specialist

[Seal omitted]

**U.S. Department of Justice
Office of Information and Privacy**

Telephone: (202) 514-3642 Washington, D.C. 20530

SEP 12 1995

Leslie R. Weatherhead, Esq.
Witherspoon, Kelley, Davenport
& Toole
1100 United States Bank Building
422 West Riverside Re: Appeal No. 95-1614
Spokane, WA 99201-0390 RLH:JGM:ERW

Dear Mr. Weatherhead:

You appealed from the action of the Criminal Division on your request for access to a July 28, 1994, letter from the British home office to George Proctor of the Criminal Division about the extradition and prosecution of Sally Croft and Susan Hagan.

As a result of discussions between Criminal Division personnel and members of my staff, I have decided to remand your request to the Criminal Division so that it, in consultation with the State Department, can make a release determination about this letter. Any information that can be released will be provided to you

EXHIBIT K

directly by the Criminal Division. If you are dissatisfied with the ultimate action taken on this matter, you may appeal again to this Office.

Inasmuch as my action does not constitute a complete grant of access, I am required by statute and departmental regulations to inform you of your right to judicial review. Such review is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is where the letter you seek is located.

Sincerely,

/s/ RICHARD L. HUFF
RICHARD L. HUFF
Co-Director

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS

DEFENDANTS' ANSWER TO
COMPLAINT FOR INJUNCTION

[Filed: Jan. 19, 1996]

Defendants admit, deny and allege as follows:

1.1 This paragraph is a characterization of plaintiff's cause of action and basis for jurisdiction which requires no response. To the extent an answer may be deemed necessary, deny.

1.2 Admit.

2.1 Admit.

2.2 Admit.

3.1 Admit.

3.2 Admit that defendants identified and located the document requested by plaintiff, but deny remaining allegations contained in this paragraph.

3.3 Deny.

3.4 Admit.

3.5 Deny.

For further answer by way of affirmative defense, these defendants allege:

1. The complaint fails to state a claim upon which relief may be granted.

2. The requested document is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(1)(A).

WHEREFORE, having fully answered, defendants pray that this action be dismissed and that the Court grant such other and further relief as may be appropriate.

DATED this 19th day of January, 1996.

JAMES P. CONNELLY
United States Attorney

/s/ JAMES R. SHIVELY
JAMES R. SHIVELY
Assistant U.S. Attorney

**U.S. Department of Justice
Criminal Division**

Washington, D.C. 20530

MAY 7 1995

MEMORANDUM

TO: Frank M. Machak, FOIA Coordinator
Department of State
Room 1239
2201 C Street, N.W.
Washington, D.C. 20520

FROM: Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Suite 1075 - Washington Center

SUBJECT: Freedom of Information Act Request -
L. Weatherhead, CRM-950056F

We are processing a request from the person named above. In searching our files, we have located the attached record which originated in an office for which you are responsible. We are referring this record to you for direct reply to the requester. We also have attached a copy of the request letter for your assistance and have advised the requester of this referral.

SHEILS DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 1

Please address correspondence to us concerning this matter to: Marshall R. Williams, Chief, Freedom of Information/Privacy Act Unit, Office of Enforcement Operations, Criminal Division, Department of Justice, Washington, D.C. 20530. Attention: Mrs. Mulligan, (202) 514-1181.

[Seal omitted]

United States Department of State
Washington, D.C. 20520

Case Control No. 9502026

DEC 11 1995

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport &
Toole
U.S. Bank Building
422 West Riverside, Suite 1100
Spokane, WA 99201-0390

Dear Mr. Weatherhead:

I refer to your letter of November 29, 1994 to the Department of Justice, requesting the release of certain material under the Freedom of Information Act (Title 5 USC Section 552). The relevant document retrieved in response to your request has been referred to us for appropriate action.

After careful review of the document, we have determined that it may not be released.

Since the document was created by the British Government, we have consulted with their Embassy here in Washington to determine its releasability. The Em-

SHEILS DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 2

bassy, in turn, consulted with the British Home Office which requested it be protected as confidential information. Consequently, the material in the document withheld in full is currently and properly classified in the interest of foreign relations. As such, it is exempt from release under subsection (b)(1) of the Freedom of Information Act.

With respect to material we have withheld under the Freedom of Information Act, you have the right to appeal our determination within 60 days. Appeals should be addressed to the Assistant Secretary for Public Affairs, Department of State, Washington, D.C. 20520-6800. The letter of appeal should refer to the case control number shown above.

Sincerely,

/s/ **[Illegible]**
Margaret P. Grafeld, Acting
Director
Office of Freedom of Information,
Privacy, and Classification Review

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS

AFFIDAVIT OF MARSHALL R. WILLIAMS

DECLARATION OF MARSHALL R. WILLIAMS

I, Marshall R. Williams, declare the following to be true and correct:

1. I am an attorney in the Office of Enforcement Operations of the Criminal Division of the Department of Justice. My specific assignment at the present time is Chief of the Freedom of Information Act/Privacy Act Unit (FOIA/PA Unit).

2. In such capacity, my duties are, *inter alia*: to act as liaison with other Divisions and Offices of the Department of Justice in responding to requests and litigation filed under both the Freedom of Information Act (5 U.S.C. §552 (1982 & Supp. II 1984) *amended by* Pub. L. No. 99-570 §§1801-1804 (Oct. 27, 1986)), and the Privacy Act of 1974 (5 U.S.C. 552a); to review requests

under these Acts which are referred to the Criminal Division by the Administrative Programs Unit of the Justice Management Division and other units of the Department; to review the search, the location of records, the preparation of responses of the Criminal Division to assure that determinations to withhold or to release records of the Criminal Division are in accordance with the provisions of both the Freedom of Information Act (FOIA) and Privacy Act (PA), and the Department of Justice regulations 16.40 *et seq.*[]; and to review copies of correspondence related to requests which have been assigned to the Criminal Division for determination and response. As Chief, I have authority to review records withheld under the FOIA and PA, and to defend actions brought under those Acts.

3. I make this declaration on the basis of knowledge acquired through the performance of my official duties.

4. Plaintiff, Leslie R. Weatherhead, made a FOIA request, dated November 29, 1994, to the Office of Public Affairs, Department of Justice. That office referred the request to the Department's Justice Management Division which is responsible for referring FOIA requests to the appropriate component of the Department.

5. The Justice Management Division received the request on January 9, 1995. The Justice Management Division determined that the appropriate component of the Department of Justice was the Criminal Division and referred the request to the FOIA/PA Unit.

6. The FOIA/PA Unit received the referral request on January 18, 1995. (Exhibit 1)

7. By letter to Plaintiff dated January 31, 1995, the FOIA/PA Unit acknowledged receipt of the request. (Exhibit 2)

8. By letter dated May 17, 1995, the FOIA/PA Unit informed Plaintiff that it had located the requested document. The letter further informed Plaintiff that, because a foreign government had created the document, it had been referred to the Department of State which is the office responsible for processing such records. The letter noted that the Department of State would review the document and respond directly to Plaintiff. (Exhibit 3)

9. The FOIA/PA Unit's referral to the Department of State is consistent with published departmental regulations located at 28 C.F.R. § 16.4(C) which states that:

When a component receives a request for a record in its possession, the component shall promptly determine whether another component, or agency, is better able to determine: (1) Whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and (2) whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion.

The regulations further state that:

If the receiving component determines that it is not the component or agency best able to determine whether or not to disclose the record in response to the request, the receiving component shall either: (i) Respond to the request, after consulting with

the component or other agency best able to determine whether or not to disclose the record and with any other component or agency having a substantial interest in the requested record or the information contained therein; or (ii) Refer the responsibility for responding to the request to the component best able to determine whether or not to disclose the record, or to another agency that generated or originated the record, but only if that other component or agency is subject to the provisions of the FOIA.

10. The referral to the Department of State was based upon the FOIA/PA Unit's determination that the Department of State was the agency best able to determine whether or not the requested document should be withheld.

11. Plaintiff sent a second letter dated May 31, 1995, requesting that the letter be treated as a formal notice of appeal. (Exhibit 4)

12. The FOIA/PA Unit received Plaintiff's May 31, 1995, letter on June 20, 1995. The FOIA/PA Unit responded to Plaintiff by letter dated July 3, 1995, indicating for a second time that pursuant to department regulations, documents originated by a foreign government are referred to the Department of State for processing. The FOIA/PA Unit also indicated in the July 3, 1995, letter that Plaintiff's request for an appeal had been forwarded to the Office of Information and Privacy which has responsibility for adjudicating such appeals. (Exhibit 5)

13. By letter to Plaintiff dated July 7, 1995, the Office of Information and Privacy indicated that it had received Plaintiff's appeal on June 30, 1995. The Office of Information and Privacy also indicated that it was processing a "substantial backlog of appeals" received prior to Plaintiff's and would inform Plaintiff of their decision as soon as possible. (Exhibit 6)

14. By letter dated September 12, 1995, the Office of Information and Privacy notified Plaintiff of its decision to remand the request to the Criminal Division for a final release determination. The letter further indicated that further review would be available following the Criminal Division's ultimate release determination. (Exhibit 7)

15. By letter dated December 11, 1995, the Department of State informed Plaintiff that it had determined to withhold the requested document in full. The letter explained that because the requested document was created by the British government, the Department of State had consulted with the British Embassy in Washington to determine releasability. The British Embassy in turn consulted with the British Home Office which requested the documents be protected as confidential information. Consequently, the documents in full were currently and properly classified in the interest of foreign relations. As such, the material is exempt from release under subsection (b)(1) of the Freedom of Information Act. (Exhibit 8)

16. The FOIA/PA Unit of the Criminal Division in turn responded directly to Plaintiff by letter dated February 9, 1996, as ordered by the Office of Informa-

tion and Privacy in its earlier review of Plaintiff's appeal.

17. In the February 9, 1996, letter the FOIA/PA Unit properly informed Plaintiff that the recent government shutdown had regrettably delayed their response. Further, in accordance with its consultation with the Department of State the information requested would not be released. This decision was based on the exemption set forth in 5 U.S.C. § 552(b)(1) which permits the withholding of information properly classified pursuant to Executive Order. (Exhibit 9)

18. The information requested was properly classified by the Department of State pursuant to Executive Order 12958, dated April 17, 1995, in effect at the time of this decision.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of March, 1996.

/s/ MARSHALL R. WILLIAMS
MARSHALL R. WILLIAMS

[EXHIBITS 1-8 OMITTED]

[Seal omitted]

**U.S. Department of Justice
Criminal Division**

Washington, D.C. 20530

CRM-950056F FEB 9 1996

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport
& Toole
1100 U.S. Bank Building
422 West Riverside Avenue
Spokane, Washington 99201-0390

Dear Mr. Weatherhead:

This is the Criminal Division's response to your appeal of May 31, 1995. We regret that the recent government shutdowns significantly delayed our response to your appeal.

In accordance with the opinion of the Office of Information and Privacy, we consulted with the Department of State concerning the document in question (letter from the British Home Office to George Proctor of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan, comprising 2 pages). The Department of State advised us that they had consulted

WILLIAMS DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 9

with the British Embassy in Washington, D.C. as to whether the document could be released. The British Embassy in turn consulted with the British Home Office. That office advised the Embassy that the document should be protected as confidential information. Inasmuch as the originating office has determined that this information is classified, the Criminal Division has determined to withhold this document in full pursuant to the following FOIA exemption set forth in 5 U.S.C. 552(b):

- (1) which permits the withholding of information properly classified pursuant to Executive Order.

As this matter is in litigation, we are omitting our standard appeals paragraph.

Sincerely,

/s/ MARSHALL R. WILLIAMS
Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF LESLIE R. WEATHERHEAD

[Filed: Oct 16 1996]

**STATE OF WASHINGTON COUNTY OF SPOKANE
COMES NOW LESLIE R. WEATHERHEAD**, plaintiff
herein, and being first duly sworn deposes and says as
follows:

1. I am the plaintiff in the above-captioned matter. I am over the age of eighteen years, and am competent to testify herein.

2. I learned late last week that after the Court rendered its final decision in this matter (dated September 9, 1996), someone I know made telephonic inquiry of a person employed by the English government about the letter we seek in this FOIA matter. I have known the person who made the inquiry for two years, and am completely confident in the truthfulness and reliability of this person, and am fully satisfied that I was given truthful information about what I relate below. I did

not ask that the inquiry be made, and I did [sic] truthful information about what I relate below. I did not ask that the inquiry be made, and I did not know that it would be made or had been made until I was so advised last week. I am being deliberately oblique about the identity of that person and of the person from whom the information set out herein was obtained, because I do not wish any person to come to grief solely for having acted in the interest of the truth (the government having exhibited such intense sensitivity over the matter).

3. According to the person who read the letter over the telephone, the letter which is at the heart of this case was, as we already knew, addressed to Mr. George Proctor of the United States Department of Justice, and was signed by an Ann Rutherford, whose name we did not know previously. The contents of the letter, which was read in full to the person who called me, may be summarized as follows:

(a) Following the extradition of Sally Croft and Susan Hagan to the United States, there were a number of points which caused concern.

(b) Sally Croft and Su Hagan could not be extradited for interstate transportation of firearms, because there is no correlative English offense, and therefore the United States could not try them for this offense under the dual criminality principle of Article 12 of the extradition treaty between the United States and Great Britain.

(c) Certain prominent persons in England have questioned whether Ms. Croft and Ms. Hagan could receive a fair trial, given the nature and age of the

case and the witnesses' testimony (which had been obtained by plea bargains).

(d) Ms. Croft and Ms. Hagan had asked that the British government seek an undertaking from the United States that the place of trial would be changed, but that is a matter for the United States courts. The British government passed its concerns on to the American authorities.

(e) The British Home Secretary requested that questions of local prejudice (i.e., in Portland, Oregon) be examined most carefully. The case had attracted considerable public and media attention. There was concern in England, within Parliament and outside, about the case, and there were expected to be Parliamentary debates about the case.

(f) The extradition case went strongly against Ms. Croft and Ms. Hagan in England. A copy of the opinions in the extradition matter would later be sent.

(g) There might conceivably be votes against the Home Secretary in Parliament in October of this year (i.e., 1994).

4. I am completely convinced of the authenticity of the foregoing, not only because of my strong faith in the truthfulness of the person who reported to me, as detailed above, but also from the surrounding circumstances: the details set out above correspond *precisely* to what I had inferred (from public facts surrounding the extradition of these women) that the letter *would* say. It was because I believed that the letter would say exactly what it says that I felt so strongly that it should

be laid before the district judge who tried Ms. Croft (the government actively opposed a venue change in that case, and never reported to the district court that the British Government had registered a strong concern about local prejudice in Oregon).

5. I assume that this Court cannot confirm for me whether the letter read to my friend is the same as the letter the Court read. Nonetheless, I make this information a matter of record at this time (on the belief that the letter read to my friend is authentic) for two reasons. First, the information provides at least some basis to grapple on appeal with the merits of the Court's judgment. It is necessary that I make a record of what I have been informed so as to be able to offer an intelligent argument to the Court of Appeals on the question whether the letter should be released, since this Court felt unable to disclose the basis for its decision. Second, if the letter this Court reviewed was materially differ-

ent from that read to my friend and outlined above, I assume this Court may wish to inquire, to learn why that is so.

Further your affiant sayeth not.

DATED this 23 day of September, 1996.

/s/ LESLIE R. WEATHERHEAD
LESLIE R. WEATHERHEAD

SUBSCRIBED AND SWORN to before me this 23 day of September, 1996.

/s/ MARY E. WILLIAMS
MARY E. WILLIAMS
Notary Public in and for the
State of Washington
Residing at Spokane,
Washington
My commission expires: 9-97

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

vs.

UNITED STATES OF AMERICA; ET AL., DEFENDANTS

ORDER

[Filed: Dec 2 1996]

BEFORE THE COURT is plaintiff's Motion to Set Aside Judgment. Plaintiff is represented by Gregory J. Workland; defendants by Sanjay Bhamhani and Assistant United States Attorney James R. Shively. The matter was argued on November 22, 1996. This Order will memorialize the Court's oral ruling.

Background

The history of this action is set out at length in Orders entered March 29, 1996 and September 9, 1996. Shortly after defendants' motion for reconsideration was granted on the latter date, an associate of plaintiff's called an unidentified employee of the British government and requested information about the letter which was the subject of the FOIA request underlying this action. The individual contacted read the letter aloud verbatim and plaintiff's friend took notes. Plaintiff believes he now has the gist of the letter and summarizes

it in detail in an affidavit. He urges that with the letter now in the public domain, defendants can no longer have an interest in shielding it from disclosure. Because this information was not developed in time to move under FRCP 59(e), plaintiff is moving to re-open under FRCP 60(b)(6).

Analysis

(1) *Standard for reopening*: FRCP 60(b)(6) allows reopening of a judgment for "any other reason justifying relief from the operation of the judgment." While broad on its face, judicial construction has severely limited the availability of this relief. Only a showing that "extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment" will suffice. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.), cert. denied, 510 U.S. 813, 114 S. Ct. 60 (1993); see also, *Maraziti v. Thorpe*, 52 F.3d 252, 254-55 (9th Cir. 1995). There are thus two components to a FRCP 60(b)(6) inquiry: (1) is the judgment erroneous; and (2) did extraordinary circumstances prevent the moving party from avoiding entry of the erroneous judgment.

This case is certainly characterized by some extraordinary features, but it is not necessary to consider whether they satisfy the *Alpine Land* standard because for reasons to be addressed below, the judgment was not erroneous when entered.

(2) *Hearsay*: An unidentified British government employee provided information to an unidentified friend of plaintiff, who relayed this information to plaintiff, who reduced it to writing in his affidavit. Courts tend to allow some latitude when its officers-in-good-

standing make factual representations. But even assuming plaintiff's affidavit meets the substantive requirements of FRE 803(24), and satisfies the rule's procedural requirements (which it does not), that strips away only one level of hearsay.

(C) *Public domain*: As noted in prior Orders, defendants have urged throughout these proceedings that the national interest lies in protecting confidentiality in the abstract rather than in guarding the particular facts contained in the subject letter. "In essence, what defendants are saying is that it is the act of disclosure itself, not disclosure of the *contents*, which would harm national security." Order entered March 29, 1996 at page 11 (emphasis original). Defendants' argument has always been that the failure to preserve confidences is the harm. As urged by Mr. Sheils in his declaration:

Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest.

Assuming that the letter read to plaintiff's friend is the same letter presented in camera (and the Court

cannot confirm or deny that), it is remarkable that someone would publish this material in a phone call. Unless it is assumed that the publisher was engaging in an act of espionage, it seems that defendants' announced concerns about incurring the wrath of the British government may have been overstated.

Although yet another strange twist in an action characterized by curious turns, it does not matter that the generating government seems to be less concerned about the secrecy of the letter than is the receiving government. Plaintiff's waiver theory has been rejected by the overwhelming majority of courts to consider it.

[T]here is a critical distinction between official government disclosures or confirmations and indirect, or unofficial disclosures for purposes of FOIA national security exemptions[.] [O]nly "official disclosures"—direct acknowledgments by an authoritative government source—about information sought in a FOIA case can preclude an agency's invocation of an otherwise properly invoked Exemption 1 or Exemption 3 claim.

Schlesinger v. C.I.A., 591 F. Supp. 60, 66 (D.C. D.C. 1984).

Even a disclosure made by a government employee with lawful access to classified material does not necessarily constitute an "official disclosure." *Simmons v. U.S. Dept. of Justice*, 796 F.2d 709, 712 (4th Cir. 1986). This is not surprising. A contrary rule would result in untold thousands of government employees, contractors and consultants possessing de facto declassification authority. Even when an agency voluntarily places

substantial sensitive information into the public domain, that does not necessarily waive a FOIA exemption as to related classified information which the agency chooses not to disclose. *Public Citizen v. Department of State*, 11 F.3d 198, 201-03 (D.C. Cir. 1993).

The facts of this case are less compelling than those of the authorities cited above. No one affiliated with the United States government, officially or otherwise, played any role in effecting disclosure. That was accomplished by a subject of Great Britain, perhaps with authority, perhaps not. However, even if disclosure was appropriate so far as Great Britain is concerned, a foreign nation does not have declassification authority over materials classified by the United States.

Finally, the executive order itself forecloses plaintiff's contention. "Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information". EO 12958 § 1.2(c).

IT IS HEREBY ORDERED:

Plaintiff's Motion to Set Aside Judgment (Ct. Rec. 24) is DENIED.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 30th day of November 1996.

/s/ **FRED VAN SICKLE**
FRED VAN SICKLE
United States
District Judge

7

Supreme Court, U. S.

FILED

OCT 22 1999

OFFICE OF THE CLERK

No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

DAVID R. ANDREWS
Legal Adviser
Department of State
Washington, D.C. 20520

STEVEN GARFINKEL
Director
Information Security
Oversight Office
Washington, D.C. 20408

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney
General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor
General

LEONARD SCHAITMAN

JOHN P. SCHNITKER

AUGUST E. FLENTJE

Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Freedom of Information Act's national security exemption, 5 U.S.C. 552(b)(1), does not apply to a letter sent in confidence from the government of Great Britain to the Department of Justice concerning a sensitive extradition matter, where the State Department officials' uncontested affidavits explain that disclosure and the resultant breach of the British government's trust will damage the United States' foreign relations both by impairing the United States' ability to engage in and receive confidential diplomatic communications and by impeding international law enforcement cooperation.

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In the Supreme Court of the United States

No. 98-1904

UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 157 F.3d 735. The opinions of the district court (Pet. App. 21a-28a, 29a-42a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 6, 1998. A petition for rehearing was denied on February 26, 1999 (Pet. App. 44a-45a), and an amended order denying rehearing was entered on March 9, 1999 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on May 27, 1999. Certiorari was granted on September 10, 1999. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

The text of the Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. IV 1998) is set forth in an appendix to this brief. Executive Order No. 12,958, 3 C.F.R. 333 (1996), governing the classification of national security information, is set forth at Pet. App. 65a-111a.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also recognized that "public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure" if they fall within one of the Act's nine exemptions. *CIA v. Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). The first of those exemptions protects from disclosure "[m]atters" that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1).

Executive Order No. 12,958, 3 C.F.R. 333 (1996), is the currently applicable Order governing the classification of national security information. The Order establishes four prerequisites to classification: (1) the information is classified by an original classification authority (i.e., an Executive Branch official authorized to classify information under the Order); (2) the information is under the control of the government; (3) the information falls within one or more of the categories of information listed in Section 1.5 of the Order that may be considered for classification; and (4) "the original classification authority determines that unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and is "able to identify or describe the damage." Exec. Order No. 12,958, § 1.2(a)(4). "Damage to the national security" is defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of in-

formation, to include the sensitivity, value, and utility of that information." *Id.* § 1.1(l).

Categories of information that may be considered for classification include "foreign government information" and information concerning the "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order 12,958, § 1.5(b) and (d).¹ Information may be classified at one of three levels: "Top Secret," "Secret," or "Confidential." *Id.* § 1.3. Information may be classified as "[c]onfidential" if "the unauthorized disclosure of [the information] reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." *Id.* § 1.3(a)(3).

The Executive Order charges the Director of the Information Security Oversight Office with responsibility for overseeing implementation of the Executive Order and monitoring agency compliance with it. Exec. Order No. 12,958, §§ 5.2, 5.3.² The Order further provides that, upon the request of an agency or the Director of the Information Security Oversight Office, the Attorney General "shall ren-

¹ Section 1.1(d)(1) of the Executive Order defines "foreign government information" to include "information provided to the United States Government by a foreign government * * * with the expectation that the information, the source of the information, or both, are to be held in confidence." The term also embraces "information received and treated as 'Foreign Government Information' under the terms of a predecessor order." *Id.* § 1.1(d)(3).

² Under the terms of the Executive Order, the Director of the Office of Management and Budget delegated the Order's implementation and monitoring functions to the Director of the Information Security Oversight Office. Exec. Order No. 12,958, § 5.2(b). When the Executive Order issued, that Office was an administrative component of the Office of Management and Budget. It is now an administrative component of the National Archives and Records Administration. The Information Security Oversight Office receives policy and program guidance from the Assistant to the President for National Security Affairs. See *id.* § 5.3(b).

der an interpretation of this order with respect to any question arising in the course of its administration." *Id.* § 6.1(b).

2. a. Sally Anne Croft and Susan Hagan were followers of Indian guru Bhagwan Shree Rajneesh and were high-level officers in the commune that Rajneesh established in Oregon in the 1980s. See Pet. App. 2a; *United States v. Croft*, 124 F.3d 1109, 1113 (9th Cir. 1997). When investigations by the United States Attorney for the District of Oregon threatened to expose illegal activities by community members, a number of Rajneesh's officers conspired to murder the United States Attorney. *Id.* at 1113-1114. Hagan was a member of the "hit team" designated to commit the murder; Croft financed the acquisition of guns and passports. *Id.* at 1114.

In 1994, after contesting extradition for nearly four years, Croft and Hagan were extradited from Great Britain to stand trial for conspiracy to murder a federal official (see 18 U.S.C. 1111, 1114, 1117). Shortly after their extradition, the British Home Office sent a letter to the Director of the Justice Department's Office of International Affairs in which the British government "convey[ed] certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K." Pet. App. 54a. Both Croft and Hagan subsequently were convicted of conspiracy to murder the United States Attorney. *Croft*, 124 F.3d at 1114. They have since completed their sentences and returned to Great Britain.

b. Respondent is a criminal defense attorney who represented Croft during her trial. In 1994, respondent submitted FOIA requests to the Department of Justice and the Department of State for a copy of the letter from the British government. Pet. App. 2a-3a. The Justice Department had possession of the letter but, because the letter had been created by a foreign government, it forwarded the letter to the State Department for response to the FOIA request. *Id.*

at 3a; see also 28 C.F.R. 16.4(c); 5 U.S.C. 552(a)(6)(B)(iii)(III). As it commonly does, the State Department requested the views of the British government on disclosure. Pet. App. 58a, para. 8. The British government responded that it was "unable to agree to [the letter's] release," because "the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence." Resp. Br. in Opp. App. 30a (emphasis in original); Pet. App. 3a. The British government further explained that, "[i]n this particular case," a request by representatives of the defendants to see the letter had been "refused on grounds of confidentiality" by the British government. *Ibid.* The British government also expressed concern that disclosure of even part of the letter would set a "precedent" that "would quickly become common knowledge amongst lawyers dealing with extradition matters." Resp. Br. in Opp. App. 30a-31a. The State Department subsequently classified the letter as "confidential" and informed respondent that the letter would not be released because it fell within FOIA Exemption 1. Pet. App. 3a-4a; J.A. 42-43. The Justice Department denied respondent's FOIA request on the same ground. J.A. 50-51.

3. Respondent then filed suit under the FOIA, 5 U.S.C. 552(a)(4)(B), and moved for summary judgment on procedural grounds.³ In opposing the motion, the government submitted the declaration of Peter M. Sheils, the Acting Director of the State Department's Office of Freedom of Information, Privacy, and Classification Review.⁴ Mr. Sheils' declaration explained that the letter "was intended by the

³ Respondent sought summary judgment solely on the grounds that the government took more than ten days to process his FOIA requests and that the letters denying the FOIA requests failed to identify the governing Executive Order. See Pl.'s Mem. in Supp. of Summ. J. at 3-4.

⁴ The government also submitted the declaration of Marshall Williams, who recounted the administrative processing of respondent's FOIA claim. J.A. 44-49.

U.K. Government to be held in confidence" and that violation of that "clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments." Pet. App. 52a-53a. As a result of such a breach of confidentiality, Mr. Sheils continued, the British government and other foreign governments would be "less willing in the future to furnish information important to the conduct of U.S. foreign relations" and "less disposed to cooperate in foreign relations matters." *Id.* at 53a. Mr. Sheils therefore concluded that disclosure of the document "would inevitably result in damage to relations between the U.K. and the U.S." *Id.* at 54a.

The district court rejected both procedural grounds for summary judgment advanced by respondent. Pet. App. 30a-31a. At that point, the federal defendants had not moved for summary judgment on the merits, and respondent had not taken issue with the foreign relations harm that the Sheils declaration stated would result if the letter were released notwithstanding the British government's expectation of confidentiality. The district court nevertheless proceeded to rule on the merits of the government's showing in support of withholding and, on that issue, granted summary judgment for respondent. *Id.* at 31a-39a. The court concluded that the threatened harm to national security identified in the Sheils declaration did not justify withholding because it concerned "the act of disclosure itself, not disclosure of the contents" of the letter. *Id.* at 39a.

The government immediately moved to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, Pet. App. 21a-28a, and submitted the declaration of Patrick F. Kennedy, the Assistant Secretary of State for Administration. Mr. Kennedy's declaration elaborated upon the "longstanding custom and accepted practice in inter-

national relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials." *Id.* at 56a. "Diplomatic confidentiality obtains," he explained, "even between governments that are hostile to each other and even with respect to information that may appear to be innocuous," and "[w]e expect and receive similar treatment from foreign governments." *Id.* at 56a-57a. Mr. Kennedy further stated that, in his expert judgment, "[t]he information in this [requested] document is of a nature that it is evident that confidentiality was expected at the time it was sent." *Id.* at 57a. For that reason, disclosure of the letter "in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government," because it "may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them." *Ibid.* The resulting "reluctan[ce]" of other governments "to provide sensitive information to the U.S. in diplomatic communications" would "damag[e] our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role." *Ibid.*

In particular, Mr. Kennedy stressed that disclosure could undermine the United States' international "law enforcement interests such as those involved in the extradition case that is the subject of the document at issue in this litigation." Pet. App. 58a. He continued:

Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern

Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here.

Ibid. In addition to submitting Mr. Kennedy's declaration, the government proffered the letter itself for *in camera* review and offered to file *in camera* affidavits elaborating upon the basis for withholding. *Id.* at 21a-22a.

The district court did not consider the Kennedy declaration adequate to support withholding, but did review the letter *in camera*. The court did so out of a concern that "highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself." Pet. App. 27a. "That proved to be the case." *Ibid.* The court explained:

When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and there is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

Id. at 27a-28a⁵

4. a. A divided panel of the court of appeals reversed and ordered the letter disclosed. Pet. App. 1a-20a. Because respondent abandoned on appeal his contention that the letter did not qualify as information concerning "foreign relations or foreign activities of the United States," *id.* at 7a, the only issue before the court of appeals was whether withholding

⁵ Respondent subsequently moved to set aside the district court's judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, asserting that an unidentified British government employee had disclosed the contents of the letter to an unidentified acquaintance of respondent. J.A. 52-56. The district court denied respondent's motion (J.A. 57-61), and he did not appeal that ruling.

could be sustained on the basis of the State Department's determination "that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security"—i.e., "harm to the national defense or foreign relations of the United States." Pet. App. 7a-8a (quoting Exec. Order No. 12,958, §§ 1.2(a)(4), 1.1(l)).

The majority concluded that the "government never met its burden of identifying or describing any damage to national security that will result from release of the letter." Pet. App. 9a. Specifically, the majority faulted the Sheils and Kennedy declarations for "focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content 'appear[s] to be innocuous.'" *Id.* at 13a; see also *id.* at 12a. The majority rejected that basis for withholding, on the ground that not all information exchanged with foreign governments or all extradition communications are categorically confidential under the Executive Order. *Id.* at 14a-16a. The court declined to give any deference to the Executive's identification, in the Sheils and Kennedy declarations, of the particular damage to foreign relations that would result from disclosure of the letter, because, in the court's view, the government had failed to make "an initial showing which would justify deference." *Id.* at 16a. The court therefore decided that it should only "look to the individual document itself" in assessing the potential harm to national security. *Ibid.* After reviewing the document *in camera*, the majority labeled the letter "innocuous," stating that the majority "fail[ed] to comprehend how disclosing the letter at this time could cause 'harm to the national defense or foreign relations of the United States.'" *Ibid.* The court accordingly reinstated the grant of summary judgment for respondent. *Id.* at 18a.

b. Judge Silverman dissented, Pet. App. 18a-20a, finding "no basis in the record to conclude otherwise than that * * * release [of the letter] would cause damage to the na-

tional security," *id.* at 20a. He emphasized that the government's declarations of confidentiality and harm were uncontroverted and, indeed, were corroborated by the British government's own refusal on grounds of confidentiality to release the letter. *Id.* at 18a-19a.⁶ Judge Silverman then concluded:

[W]e judges are outside of our area of expertise here. * * * [T]he majority has presumed * * * to make its own evaluation of both the sensitivity of a classified document and the damage to national security that might be caused by disclosure. With all due respect, I suggest that in matters of national defense and foreign policy, the court should be very leery of substituting its own geopolitical judgment for that of career diplomats whose assessments have not been refuted in any way.

Id. at 20a.

c. The government then filed a motion to stay the court of appeals' mandate pending the filing of a petition for a writ of certiorari. In support of the motion, the government submitted the declaration of then Acting Secretary of State Strobe Talbott (Pet. App. 60a-64a), who reemphasized that the extradition of the two women was "a matter of political sensitivity" to Great Britain. *Id.* at 62a. He also reiterated the importance of maintaining the confidentiality of the letter:

Great Britain is perhaps our staunchest and certainly one of our most important allies. On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation,

⁶ During oral argument, counsel for the United States represented to the court that the recently installed Labor Party government in Great Britain had informed the State Department that, like the predecessor Conservative Party government, it considered disclosure of the letter at issue in this case to be "out of the question."

trade disputes, matters before the United Nations Security Council, human rights and law enforcement. In many of these areas we have engaged in diplomatic dialogue with officials of the British [government] in the course of which information was exchanged with an expectation of confidentiality. Such confidential diplomatic dialogue is essential to the conduct of foreign relations.

Id. at 61a.

Based upon his personal review of the letter, the Acting Secretary concluded that disclosure of Britain's confidential communication "could reasonably be expected to cause damage to the foreign relations of the United States" and, in particular, could impair the "general bilateral relationship between the U.S. and the U.K. on law enforcement cooperation and other matters" by "dealing a setback to U.K. confidence in U.S. reliability as a law enforcement partner." Pet. App. 63a. The Ninth Circuit granted the motion to stay the mandate. J.A. 6.

SUMMARY OF ARGUMENT

1. A divided court of appeals ordered the release of a sensitive and classified diplomatic communication based solely on its conclusion that the document "appear[s]" to be "innocuous" and that, in the court's judgment, the document's disclosure could not reasonably be expected to result in damage to the national security of the United States. In so holding, the court expressly refused to accord any deference to the declarations of the responsible Executive Branch officials, which explained how disclosure of the document *would* damage the foreign relations of the United States, both with Great Britain and more broadly. In particular, the declarations explained in detail how the very act of disclosure of a letter that was sent in confidence by the British government and that pertains to a diplomatically sensitive extradition case would undermine ongoing and future exchanges with the British government on many matters, in-

cluding in the vitally important area of law enforcement cooperation.

Since the founding of the Republic, Congress and the courts have consistently recognized that the separation of powers compels courts to accord the Executive Branch's foreign affairs judgments the utmost deference. Judgments about the damage to national security that disclosure of a communication with a foreign government could entail necessarily involve delicate political predictions and nuanced assessments of diplomatic conditions and expectations. The determinations must be made by officials who are responsible for and well-versed in geopolitical developments and the interconnection of foreign relations matters. Judges lack expertise in foreign relations matters and their review necessarily is confined to the examination of the particular document(s) before them, within the confines of courtroom procedures and divorced from their larger diplomatic context. They therefore should defer to the Executive Branch unless its identification of the harm to national security is implausible. Nothing in the Freedom of Information Act's text, structure, or legislative history supports the contrary approach taken by the court of appeals here, which disregarded the constitutionally compelled rule of deference to the Executive Branch.

2. The damage to the national security against which the Executive Order protects includes the harm arising from the very act of disclosure and the attendant breach of a foreign government's trust. The plain text of the Executive Order embraces that harm, and two centuries of diplomatic practice and decisions of this Court confirm that it is a substantial one. Indeed, the Executive Branch's ability to maintain confidential relationships is critical to its ability to obtain information that is vital to the protection of the United States' national defense and foreign relations. Negotiations and candid appraisals of foreign intelligence information and political developments abroad are indispensable to the

United States' foreign policy; yet, they cannot proceed in the absence of trust. In the realm of international law enforcement, moreover, preserving the ongoing trust and cooperation of foreign governments is a critical foreign policy objective in its own right. If foreign governments cannot be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will be spared the risks to their interests that may attend such exposure, the United States will not be able to obtain the information it so critically needs for the conduct of its foreign relations.

ARGUMENT

THE COURT OF APPEALS DISREGARDED THE REQUIREMENT UNDER THE CONSTITUTION AND THE FREEDOM OF INFORMATION ACT THAT IT ACCORD THE UTMOST DEFERENCE TO THE EXECUTIVE BRANCH'S DETERMINATION THAT THE REQUESTED INFORMATION MUST BE CLASSIFIED IN THE INTEREST OF NATIONAL SECURITY

Section 552(b)(1) of the Freedom of Information Act (FOIA) exempts from disclosure all matters that are "specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such an Executive order." The Executive Order applicable to this case is Executive Order No. 12,958, 3 C.F.R. 333 (1996). It provides that information may be classified if four conditions are met. Only the fourth condition is at issue in this case.⁷ That criterion is that the

⁷ The first condition is that the information is classified by an "original classification authority," which occurred here. See Exec. Order. No. 12,958, §§ 1.2(a)(1), 1.4(a) and (c); 22 C.F.R. 9.7; Pet. App. 7a, 32a. The second—that the information is "under the control of the United States government"—also is plainly satisfied here. Pet. App. 6a-7a, 32a. Finally,

original classification authority—here, the responsible State Department official—has “determine[d] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security” and has been “able to identify or describe th[at] damage.” Exec. Order. No. 12,958, § 1.2(a)(4). The uncontested State Department declarations meet that standard. They identify and describe a concrete harm to the United States’ foreign policy interests—a breach of the trust of an important ally. They also explain how disclosure of the letter in violation of that trust reasonably could be expected to damage the United States’ foreign relations with Great Britain and other nations by impairing the United States’ ability to engage in and obtain confidential diplomatic communications and by impeding international law enforcement cooperation. That explanation fully satisfied the governing Executive Order and, therefore, also satisfied Exemption 1 of FOIA.

the district court and court of appeals found (*id.* at 7a, 35a), and respondent has conceded (*id.* at 7a), that the British government’s letter qualifies for classification as information concerning the “foreign relations or foreign activities of the United States.” See Exec. Order No. 12,958, § 1.5(d).

In the district court and the court of appeals, the government argued that the letter also was properly regarded as “Foreign Government Information.” The district court concluded (Pet. App. 33a-35a) that the letter did not qualify as foreign government information because the British government lacked a contemporaneous expectation of confidentiality. That ruling improperly disregarded the State Department’s expert assessment that the document is “of a nature that it is evident that confidentiality was expected at the time it was sent” (*id.* at 57a), and the British government’s explicit representation that “the normal line in cases like this” is that such “correspondence between Governments is confidential” (Resp. Br. in Opp. App. 30a). Furthermore, the British government sent the letter at a time when the United States government presumed the confidentiality of such communications. See Exec. Order No. 12,356, 3 C.F.R. 169, § 1.3(c) (1983) (Resp. Br. in Opp. App. 7a); see also Exec. Order No. 12,958, § 1.1(d)(3) (“Foreign Government Information” includes all “information received and treated as ‘Foreign Government Information’ under the terms of a predecessor order”).

A. The President’s Constitutional Responsibilities For National Defense And Foreign Relations Include The Authority, Long Recognized By Congress, To Protect Confidential National Security Information

The Ninth Circuit held that no deference was owed to the Executive Branch officials’ explanation of the basis for classification of the British government’s confidential letter, because deference was not “justif[ied]” by an unspecified “initial showing,” and because the harm identified by State Department officials did not fall within the court’s own straitened view of what constitutes damage to the national security. Pet. App. 13a-14a, 16a. Other courts of appeals in FOIA Exemption 1 cases, however, have consistently accorded “substantial weight” to the declarations of Executive Branch officials explaining the basis for the classification of documents and the risk that disclosure would pose to national security.⁸ That virtual unanimity in approach is rooted in the separation of powers under the Constitution. Indeed, Congress itself has long recognized that fundamental principle of deference to the Executive Branch in protecting confidential information concerning the Nation’s defense and foreign relations, and it intended FOIA to be implemented in a manner that would respect that principle.

1. The Executive Branch’s “authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President * * * as head of the Executive Branch and as Commander in Chief,” and thus “exists quite apart from any explicit congressional grant.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President’s exclusive authority to “receive Ambassadors and other public Ministers,” U.S. Const. Art. II, § 3, provides further textual grounding specifically for the Executive’s primacy in managing the Nation’s diplomatic relations. Accordingly,

⁸ See Pet. 13 & n.5 (citing cases); Pet. Reply 2 n.2 (same).

"courts traditionally have been reluctant to intrude upon the authority of the Executive" over the management of national security information, because of "the generally accepted view that foreign policy [is] the province and responsibility of the Executive." *Egan*, 484 U.S. at 529-530 (quoting *Haig v. Agee*, 453 U.S. 280 293-294 (1981)).⁹ With respect to that area of Presidential responsibility, "the courts have traditionally shown the *utmost deference*." *Egan*, 484 U.S. at 530 (emphasis added) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).¹⁰

The President's paramount authority in the area of foreign relations has been recognized since the founding of the Republic. Thomas Jefferson advised President Washington that "[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly." 16 *The Papers of Thomas Jefferson* 379 (J. Boyd, ed. 1961). In an early extradition matter involving Great Britain, John Marshall, who was then a Member of Congress, declared that the President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations," and that "[t]he [executive] department * * * is entrusted with the whole foreign intercourse of the nation." Speech of March 7, 1800, in 4 *The Papers of John Marshall* 104-105 (C. T. Cullen ed., 1984).¹¹

⁹ See also *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring) ("[T]he Executive is endowed with enormous power in the two related areas of national defense and international relations.").

¹⁰ See also *Haig*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

¹¹ See also Senate Comm. on Foreign Relations, 14th Cong., 1st Sess., Report of Feb. 15, 1816, reprinted in 8 *Comp. of Reports of the Senate Comm. on Foreign Relations, 1789-1901*, at 24 (1901) ("The President is

2. It also has been recognized "since the beginning of the Republic" that the "President's constitutional authority to control the disclosure of documents and information relating to diplomatic communications" is an indispensable adjunct of his foreign affairs power.¹² Thus, John Jay explained in *The Federalist No. 64*:

There are cases where the most useful [foreign policy] intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. * * * [T]here doubtless are many [such persons] who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

The Federalist No. 64, at 392-393 (C. Rossiter ed., 1961).

So complete is the President's ability to protect against the unauthorized disclosure of foreign relations information that it includes the authority to withhold information about foreign affairs and diplomatic negotiations even from Congress, "if in [the President's] judgment disclosure would be incompatible with the public interest;" and that is so

the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.") (quoted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)); Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28-29 (in creating the Department of Foreign Affairs, Congress gave the President wide discretion to determine what activities the department would undertake in the realm of diplomatic relations).

¹² The Sufficiency of the President's Certification Under the Mexican Debt Disclosure Act, 20 Op. Off. Legal Counsel 673, 678 (1996).

notwithstanding the Senate's role under Article II, Section 2 of the Constitution in giving its advice and consent to the making of treaties.¹³ That discretion to withhold confidential national security information even from Congress, or to restrict the extent of Congress's access to it, has been exercised by almost every President, from the time of George Washington to the present, in those instances when the President has determined that disclosure would be "incompatible with the public interest." President Washington refused to lay before the House of Representatives instructions, correspondence, and documents underlying the negotiation of the Jay Treaty because "[t]o admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent."

1 J. Richardson, *Messages and Papers of the Presidents* 195 (1896). The "wisdom" of that decision "was recognized by the House itself and has never since been doubted." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). That is because "[a] discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations." 20 *The Papers of Alexander Hamilton* 68 (H. Syrett ed., 1974) (Letter from Alexander Hamilton to President Washington (Mar. 7, 1796)).¹⁴

¹³ Memorandum from John R. Stevenson, Legal Adviser, Dep't of State, and William H. Rehnquist, Assistant Attorney General, Dep't of Justice, Office of Legal Counsel, The President's Executive Privilege to Withhold Foreign Policy and National Security Information (Dec. 8, 1969) (Stevenson Memo.).

¹⁴ President Washington also refused to accede to a Senate request for copies of correspondence "between the Minister of the United States at the Republic of France and said Republic." 4 *Annals of Cong.* 34, 37-38 (1794); see also W. Dellinger & H. Powell, *The Attorney General's First Separation of Powers Opinion*, 13 *Const. Commentary* 309, 316 (1996).

President Tyler likewise withheld from the House of Representatives correspondence between the United States and Great Britain over the United States' Northeastern and Northwestern boundaries, because "no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests." 4 J. Richardson, *supra*, at 101, 201-211. President Polk declined to comply with a request from the House of Representatives for information concerning efforts to negotiate a peaceful resolution of disputes with Mexico because disclosure "could not fail to produce serious embarrassment in any future negotiation between the two countries." *Id.* at 566.¹⁵

Correspondingly, Congress historically has accorded the utmost deference to such Presidential judgments in the for-

¹⁵ Similar decisions to withhold information where the Executive Branch determined that disclosure was not in the public interest were made by, among others, Presidents Fillmore (proposal by the King of the Sandwich Islands to transfer the islands to the United States); Lincoln (communications with New Granada); and Cleveland (correspondence with Spain). See *History of Refusal by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. Off. Legal Counsel 751, 759-770 (1982); see also *The Sufficiency of the President's Certification Under the Mexican Debt Disclosure Act*, 20 Op. Off. Legal Counsel 673 (1996); *East-West Trade: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Operations*, 84th Cong., 2d Sess. 162 (1956) (Secretary of State refuses to disclose documents pertaining to discussions with foreign governments, in part because it "would constitute a breach of trust"); S. Doc. No. 130, 67th Cong., 2d Sess., 62 Cong. Rec. 2771-2772 (1922) (President Harding declines to submit to Congress records of discussions and conversations with foreign governments that occurred during the Washington Conference on the Limitation of Armament); S. Docs. Nos. 798, 799, 63d Cong., 3d Sess., 52 Cong. Rec. 2854-2855 (1915) (President Wilson declines to disclose diplomatic communications relating to the shipment of copper to neutral countries); Stevenson Memo., *supra* (chronicling history of presidential refusals to disclose foreign policy information if it was considered contrary to the national interest to do so); H. Wilkinson, *Demands of Congressional Committees for Executive Papers*, 10 *Fed. Bar J.* 103-150, 223-259, 319-350 (Apr., July & Oct. 1949) (additional examples).

foreign policy area. "A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned." *Curtiss-Wright*, 299 U.S. at 321. Indeed, in requesting national defense information from President Theodore Roosevelt, Senator Spooner acknowledged:

It would not be admissible at all that either House should have the power to force from the Secretary of State information connected with the negotiation of treaties, *communications from foreign governments*, and a variety of matters which, if made public, would result in very great harm in our foreign relations.

41 Cong. Rec. 98 (1906) (emphasis added).¹⁶ Congress even has permitted the President to withhold the text of secret agreements with foreign nations from the full Congress if, in the President's judgment, public disclosure would "be prejudicial to the national security." 1 U.S.C. 112b(a). Such agreements need only be submitted to two specially designated congressional committees, whose members operate "under an appropriate injunction of secrecy *to be removed only upon due notice from the President*." *Ibid.* (emphasis added).

In short, at the time Congress amended Exemption 1 of FOIA in 1974, Congress itself had, over the course of almost 200 years, consistently acquiesced in decisions by the President to decline to furnish information pertaining to foreign affairs, or otherwise accommodated his requests to maintain the confidentiality of such information. And, where the Executive Branch has made such information available to Congress, the conditions of secrecy have been respected between the Branches, so that confidentiality could be maintained as against the outside world. That history of

¹⁶ See also *New York Times*, 403 U.S. at 729 (Stewart, J., concurring) ("[U]nder the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power [over the conduct of foreign affairs] successfully.").

congressional respect for the Executive's judgments concerning the confidentiality of information about foreign relations or national defense provides compelling support for a rule of great deference to the Executive's classification judgments in the context of FOIA, which provides for disclosure of non-exempt documents to the public at large.¹⁷

B. The Complex And Delicate Character Of Diplomatic Relations Requires That Courts Also Accord Utmost Deference To Executive Branch Determinations To Preserve The Confidentiality Of National Security Information

Like Congress, the courts have historically afforded the Executive Branch's foreign policy judgments and concomitant classification decisions the utmost deference, reflecting the distinct institutional roles and capabilities of the two Branches:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803). Accordingly, "[e]ven if there is

¹⁷ "[T]he practical construction of the Constitution, as given by so many acts of congress, and embracing almost the entire period of our national existence, should not be overruled" absent compelling evidence to the contrary. *Field v. Clark*, 143 U.S. 649, 691 (1892).

some room for the judiciary to override the executive determination [on classification], it is plain that the scope of review must be exceedingly narrow." *New York Times Co. v. United States*, 403 U.S. 713, 758 (1971) (Harlan, J., dissenting).

First, deference to the Executive Branch is indispensable because the impact that revelation of a foreign government's confidences would have on the conduct of the Nation's foreign policy cannot be assessed in a vacuum. The United States' relationship with a particular foreign government—especially as close an ally as Great Britain—necessarily involves multiple negotiations and dialogues about a variety of sensitive subjects at any given time.¹⁸ In light of the inevitable give-and-take and delicate balancing of interests that such ongoing relations entail, courts considering Executive Branch declarations in FOIA cases must keep in mind that geopolitical developments outside the courtroom can give a document a sensitivity that is not apparent to a non-expert from the face of the document.

Second, judgments about the harm to foreign relations and national security necessarily entail large elements of prediction, and those predictive judgments "must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529.

For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside non-expert body to review the sub-

¹⁸ See Pet. App. 61a ("On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation, trade disputes, matters before the United Nations Security Council, human rights and law enforcement.").

stance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction [of risk to national security] with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Ibid. (internal quotation marks, citation, and ellipsis omitted); see also *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (per curiam) ("The problem is to ensure *in advance* * * * that information detrimental to national interest is not published.").

Executive Order No. 12,958 itself incorporates those elements of judgment and prediction in safeguarding the Nation's secrets. It permits the classification of information if the responsible classifying official "determines," on the basis of his or her expertise, that disclosure "reasonably could be expected to result in damage to the national security." *Id.* § 1.2(a)(4). Courts must respect such determinations. Executive Branch experts are better acquainted than courts, for example, with the politically sensitive and volatile context in which a government extradites one of its own citizens to stand trial in a foreign land,¹⁹ and the adverse

¹⁹ With respect to the public perception in Great Britain of the extraditions out of which this case arose, see, e.g., O. Bowcott, *Extra-special Relationship*, *The Guardian*, July 5, 1994, at T18 (describing the 124-year history of British/U.S. cooperation in extradition matters; Croft's attorney claims the Home Secretary is "fearful of upsetting the Americans maybe because he wants IRA suspects held in the States sent back here"; "[e]xtradition appeals have the quality of transforming themselves into political issues"); C. Reed, *IRA "Quid Pro Quo" Deal Suspected*, *The Guardian*, Apr. 5, 1994, at 4 ("It will not have escaped the Home Secretary's notice in considering the extradition to America of Sally Croft and Susan Hagan * * * that four IRA prison escapees in California are the subject of intense—and so far unsuccessful—attempts to extradite them to Britain."); S. Tendler, *MPs Seek to Halt Extradition of Ex-Cult Members*, *The Times of London*, Mar. 29, 1993, available in 1993 WL 10565426 ("There is concern [the Home Secretary] may be under pressure

consequences that might ensue for a foreign government if a confidential diplomatic communication with the United States were to be disclosed.²⁰

Third, diplomatic relationships come with a history and a future. With respect to any particular nation at any given time, the United States may be attempting to repair a serious breach in relations, to set the foundation for a new and enduring relationship, or to build upon and expand a prior history of cooperation. In that context, the old saw that "timing is everything" assumes critical weight. Elections, coups, no-confidence votes, and unforeseen domestic developments in a foreign country can transform overnight the significance and sensitivity of a communication. Likewise, a judicial order to breach a foreign government's trust and disclose a sensitive communication that issues at a time when the Executive Branch is struggling to repair or maintain contacts with that government due to other developments in the international arena could have grave and enduring repercussions for United States' foreign policy.

Judges, who are neither versed in the intricacies of diplomatic dialogue nor schooled in the often tangled weave

to allow the extradition because of the need to guarantee continued cooperation from the American authorities on areas such as the extradition of IRA suspects.").

²⁰ While the political sensitivity of information in this country will not warrant classification under the Executive Order if the sensitivity arises solely out of a desire to "prevent embarrassment to a person, organization, or agency" in the United States government, Exec. Order No. 12,958, § 1.8(a)(2), that concern is an important and highly relevant consideration when information supplied by a foreign government is at issue and the information is sensitive to that nation. Cf. *United States Dep't of State v. Ray*, 502 U.S. 164, 176-177 & n.12 (1991) (exposure of persons outside the government to embarrassment, in violation of a promise of confidentiality, is a relevant consideration under Exemption 6). Indeed, it is in those circumstances that release of a document in breach of an expectation of confidentiality could have a particularly negative impact on relations with that country.

of foreign policy operations, and who must review a single document or group of documents within the narrow framework of case-specific courtroom litigation, are ill-equipped to identify or predict independently the national security implications that would attend the disclosure of foreign government communications. As courts have recognized in the analogous context of intelligence information, the collection and preservation of information affecting the national security "is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair." *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978).

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).²¹ Thus, what is "seemingly innocuous" or "superficially innocuous" to non-expert bodies may be of great significance to experts in national security matters (*CIA v. Sims*, 471 U.S. 159, 176, 178 (1985));²² accordingly, the classification judgments of those

²¹ See also *The Federalist No. 64*, *supra*, at 393 (Jay) ("Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.")

²² Contrary to respondent's assertion in its Brief in Opposition (at 1, 17), we have never conceded and do not concede here that the contents of the letter at issue in this case are innocuous. See, e.g., June 3, 1996 Tr. 12. We contend only that some communications bearing on foreign relations matters may, to untrained eyes, appear to be so. See Pet. App. 56a.

"who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference" (*id.* at 179).

International law enforcement efforts and extradition matters, like those at issue in this case, well illustrate the need for substantial judicial deference to the "broad view of the scene," *Marchetti*, 466 F.2d at 1318, and to the contextual judgment that Executive Branch officials bring to bear on classification decisions. "[R]elations with foreign nations * * * are necessarily implied in the extradition of fugitives from justice." *United States v. Rauscher*, 119 U.S. 407, 414 (1886).²³ The United States is involved in an average of 50 extradition matters with Great Britain each year.²⁴ In addition, the United States is often engaged in a variety of other law enforcement matters with Great Britain, such as cooperative efforts to apprehend and bring to justice international terrorists and to prevent criminal activities. At the time of Croft's and Hagan's extradition proceedings, for example, the United States also was seeking the extradition of two of their co-conspirators from the Federal Republic of Germany and South Africa. Moreover, some extraditions—such as those involving former heads of state or international terror-

²³ See also *Terlinden v. Ames*, 184 U.S. 270, 290 (1902) ("The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision."); *Austin v. Healey*, 5 F.3d 598, 600 (2d Cir. 1993) ("Extradition is primarily a function of the executive branch, and the judiciary has no greater role than that mandated by the Constitution, or granted to the judiciary by Congress."), cert. denied, 510 U.S. 1165 (1994); *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993) ("Extradition ultimately remains an Executive function. * * * The Secretary [of State] exercises broad discretion and may properly consider myriad factors affecting both the individual defendant as well as foreign relations which an extradition magistrate may not.").

²⁴ Current extradition matters include the United States' effort to extradite from the United Kingdom three persons suspected of involvement in the 1998 bombing of the American embassies in Tanzania and Kenya, which killed 224 people, including twelve Americans.

ists²⁵—necessarily entail a high degree of political and diplomatic dialogue and sensitive judgments.

For those reasons, the concerns that State Department officials expressed (Pet. App. 53a, 57a-58a, 62a-63a) about the real-world impact of breaching Great Britain's confidence on the United States' law enforcement efforts in the United Kingdom and more generally with other nations do not "lack[] * * * particularity" (*id.* at 12a). Quite the opposite, they reflect realistic appraisals of a complicated and intertwined diplomatic situation by State Department experts who have the institutional responsibility and experience to see the foreign relations "forest" and not just the particular "tree" before the court, and who thus can foresee the ripple effect that a single breach of trust would have on important United States foreign policy and international law enforcement objectives.²⁶ "The judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1445 (1999).

C. Courts Likewise Must Accord The Utmost Deference To Executive Branch Classification Decisions Concerning Documents That Are The Subject Of Suits Under The Freedom Of Information Act

FOIA's Exemption 1 protects from mandatory disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the

²⁵ For example, the United States is currently attempting to extradite to Switzerland the former prime minister of the Ukraine, Pavel Lazarenko, to face money laundering charges involving the alleged embezzlement of national assets (No. Cr 99-0122-MJJ-MISC, N.D. Cal.). The extradition from Pakistan of Ramzi Yousef, who was charged with the World Trade Center bombing in New York City, was likewise of particular political and diplomatic sensitivity.

²⁶ Cf. *Snepp*, 444 U.S. at 512-513 (describing ripple effect of former intelligence agent's publication of *unclassified* information, without CIA review, on government's ability to obtain intelligence information).

interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1). Consistent with the constitutional history and the executive, congressional, and judicial practice discussed above, that statutory provision retains in the President broad authority, first, to identify and define through established criteria the types of disclosures that, in his judgment, threaten national security, and, second, to provide for the determination by Executive Branch officials in particular cases whether information should be classified under those criteria. FOIA's text, structure, and legislative history evidence Congress's intent that Executive Branch judgments be accorded the utmost deference in both respects. The court of appeals ignored that command.

1. The Utmost Deference Is Owed To The Executive's Interpretation Of Its Own Executive Order That Damage To The National Security Includes Harm Resulting From The Act Of Disclosing A Confidential Communication From A Foreign Government

In ordering disclosure of the British Government's confidential communication, the Ninth Circuit did not find that the State Department declarations failed to identify a threatened harm to national security. To the contrary, the court criticized the State Department officials for "focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content 'appear[s] to be innocuous.'" Pet. App. 13a. Nor did the court of appeals disagree with the State Department's determination that such harm "reasonably could be expected to result" (Exec. Order No. 12,958, § 1.2(a)(4)) from disclosure of the letter. Rather, the Ninth Circuit found the State Department's classification of the document to be improper because it rested largely upon the "damage resulting solely from disclosing foreign government information" even when the document's "con-

tent appear[s] to be innocuous" (Pet. App. 13a, 14a), rather than upon the harm arising from disclosing "the individual document itself" (*id.* at 16a). By imposing its own conception of harm to the national security on the Executive Branch, the court of appeals transgressed FOIA's demarcation of the proper boundaries of judicial review, ignored the Executive Order's language, and paid scant heed both to this Court's precedents and the "practical necessities" of modern diplomatic relations. *Sims*, 471 U.S. at 169.

a. FOIA requires deference to the President's specification of classification criteria: The text and structure of Exemption 1 respect the President's inherent, plenary authority to identify those "matters" that should be "kept secret in the interest of national defense or foreign policy." 5 U.S.C. 552(b)(1)(A). Congress did not attempt to restrict Executive Branch classification judgments to Congress's vision of harm to the national security or to standards articulated in FOIA itself. Rather, the exemption specifically accedes to the President's own formula for classifying national security information, as established in the governing Executive Order. See also 120 Cong. Rec. 6811 (1974) (Rep. Moorhead) ("[T]he court must accept the language of the Executive order as it was written.").

Congress, moreover, protected under Exemption 1 all "matters" that an Executive Order authorizes to be kept secret "in the interest of national defense or foreign policy." 5 U.S.C. 552(b). "[M]atters" is a capacious term that invites consideration of informational disclosures that go beyond the words written on a piece of paper. At a minimum, Congress's use of such broad language provides no basis for contracting the exemption's protective sphere.

b. The Executive Order protects against the harm that arises from the very act of disclosure: The text of the Executive Order, to which FOIA itself gives operative effect, does not support a conception of harm to national security that is confined to the four corners of a document.

The Order's definition of "[d]amage to the national security" reaches harm "from the unauthorized disclosure of information." Exec. Order No. 12,958, § 1.1(l). That language is most naturally read to include harm emanating both from the information itself and from the very act of disclosure.

The "information" that the Executive Order protects from disclosure, moreover, is separately defined to mean "any knowledge that can be communicated * * * regardless of its physical form or characteristics." Exec. Order No. 12,958, § 1.1(b). That language plainly embraces not just the tangible document at issue in a FOIA case, but also less tangible knowledge that would be revealed by the act of disclosure, such as the acknowledgment that a foreign government made a particular communication or that it conveyed specific statements, views, or concerns to another government.

The definition of "damage to the national security" goes on to "include the sensitivity, value, and utility of that information." *Ibid.* One important measure of the "sensitivity" of the information in this case is the fact that the foreign government communicated it in confidence and continues (reasonably in the view of the United States government) to object to its disclosure in breach of that trust. The court of appeals' attempt to distinguish between the "sensitivity" of a document's contents (which it would deem covered by the Executive Order) and the foreign government's "sensitivity" about disclosure of those contents (which the court would not protect), fails to recognize that the two are closely intertwined. In any event, the ordinary meaning of the word "includ[es]" "is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Accordingly, the Executive Order textually envisions that other types of harm also may be considered by classifying agencies, such as broader, institutional impacts on the United States' relations with a particular country or on the overall conduct of the United States' for-

eign affairs and extradition matters with other nations. See Exec. Order No. 12,958 (preamble) (the national interest requires certain information to be maintained in confidence to protect "our participation in the community of nations").

Any possible doubt about the scope of the harm to national security addressed by the Executive Order is laid to rest by the Order's provisions regarding the duration of classifications. There, the Executive Order specifically provides that, if "the release" of classified information will "damage relations between the United States and a foreign government," the document falls within the extraordinary category of information that is exempt from the general ten-year rule for declassification. Exec. Order No. 12,958, § 1.6(d)(6).²⁷ Those special exceptions confirm that the damage to diplomatic relations resulting from the act of releasing a document is an independent and highly relevant component of the "[d]amage to the national security" against which the Executive Order is intended to guard.

If the Executive Order were nonetheless thought to be ambiguous on the point, however, the court of appeals should have deferred to the Executive Branch's reasonable interpretation of its language. See *Udall v. Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation [of Executive Orders] may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it.").²⁸ Congress in-

²⁷ See also Exec. Order No. 12,958, § 3.4(b)(6) (exempting from automatic declassification after 25 years information "the release of which should be expected to * * * seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States").

²⁸ Deference to the Executive's interpretation of an Executive Order should be even greater than it is to an agency's construction of its own regulations (see *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-151 (1991)). In the latter area, the agency's regulation

tended that well-established rule of deference to apply in Exemption 1 cases.²⁹ Moreover, because the Executive Order concerns foreign affairs and national security—matters steeped in a tradition of independent Executive authority—the rule of deference to the Executive’s interpretation of its own Order should apply with particular force, sustaining any rational construction of the Order that is not clearly foreclosed by its text.

The court of appeals reasoned that the harm arising from the very act of disclosure could not be considered because the current Executive Order eliminated a presumption in the prior Order that the release of “foreign government information” would damage the United States’ foreign relations. See Exec. Order No. 12,356, § 1.3(b) and (c), 3 C.F.R. 169 (1983). But elimination of the across-the-board presumption that the disclosure of “foreign government information” will *always* harm national security because of the prospect of a broader impact on diplomatic communications plainly does not mean that the disclosure of foreign gov-

and ultimately its interpretation must reasonably correlate with a substantive standard set by an Act of Congress. With respect to Executive Orders, by contrast, the Executive Branch is wholly responsible for establishing the Order’s operational goals, selecting the substantive criteria to regulate Executive Branch behavior, interpreting the Order’s terms, and applying the Order in various factual contexts. The entire process is thus internalized to the Executive Branch and involves subjects of “predominant executive authority and of traditional judicial abstention.” *Webster v. Doe*, 486 U.S. 592, 616 (1988) (Scalia, J., dissenting); see also *New York Times*, 403 U.S. at 729 (Stewart, J., concurring) (the promulgation and enforcement of executive regulations governing classified information in the foreign affairs realm is “a matter of sovereign prerogative and not . . . a matter of law as courts know law”); compare *Curtiss-Wright*, 299 U.S. at 319-322; *Loving v. United States*, 517 U.S. 748, 772-774 (1996).

²⁹ See 120 Cong. Rec. 6811 (1974) (Rep. Erlenborn) (“[T]he court would not have the right to review the criteria under the Executive Order. The description ‘in the interest of the national defense or foreign policy’ is descriptive of the area that the criteria have been established in but does not give the court the power to review the criteria.”).

ernment information will *never* harm the national security in that way. It simply means that such harm will no longer be presumed for every bit of information the United States receives from foreign governments.³⁰ Indeed, none of the Executive Orders issued before 1978 contained such a presumption either,³¹ yet the impact of breaching confidentiality on the United States’ ability to receive vital, candid foreign policy information from other governments has long been recognized. It is inconceivable that the President, in issuing Executive Order No. 12,958, intended to mandate a wholesale abrogation of the longstanding practice of diplomatic confidentiality without giving a hint of that intent in the actual text of the Executive Order.³²

Moreover, the approach taken by the court of appeals—that the Government must be able to make a particularized showing on a case-by-case basis regarding the specific harm that would be caused by disclosure of the *contents* of the specific communication in order to protect confidential diplomatic communications from public disclosure—would be un-

³⁰ Cf. *Legille v. Dann*, 544 F.2d 1, 10 (D.C. Cir. 1976) (presumptions are procedural and do not change substantive law). If anything, the elimination of the presumption magnified the court of appeals’ error: it did not simply fail to heed a generalized presumption; it refused to grant meaningful deference to the expert and individualized judgments of Executive Branch officials focused on the precise disclosure issue before the court.

³¹ See Exec. Order No. 11,652, 37 Fed. Reg. 5209 (1972) (effective 1972-1978); Exec. Order No. 10,501, 18 Fed. Reg. 7049 (1953) (effective 1953-1972); Exec. Order No. 10,290, 16 Fed. Reg. 9795 (1951) (effective until 1953).

³² Highlighting the flaw in the court of appeals’ reasoning is the fact that the presumption of harm also was eliminated for “the identity of a confidential foreign source, or intelligence sources or methods.” See Exec. Order No. 12,356, § 1.3(c). Surely a court could not extrapolate from that action the conclusion that the government intended to foreclose itself from showing in individual cases that an intelligence source communicated information against a background understanding or assumption of confidentiality and that breach of his trust would seriously impair the government’s intelligence gathering capability. See *Sims*, 471 U.S. at 169-180.

workable in practice. Because a content-based analysis, by its nature, could be made only once the substance of the communication is known, *i.e.*, after its delivery, the court of appeals' test would fail to furnish an assurance of confidentiality *in advance*, which often is essential to candid communications.

Thus, the revision of the Executive Order in no way bars the Executive from showing that particular foreign government communications were made against the established background expectation of confidentiality for diplomatic communications, the breach of which would damage the United States' foreign relations. Rather, elimination of the automatic presumption contemplated only that, in some cases—such as routine scheduling information or congratulatory/condolence messages from certain governments, and perhaps, on occasion, more substantive matters—the established norm of confidentiality in diplomatic relations might never attach, could be outweighed by other considerations, or could be waived. Elimination of the automatic presumption also has the effect of requiring an actual judgment by a responsible Executive Branch official about each document that may be withheld, thereby enhancing the integrity of the classification process and promoting public confidence in its operation. The current Executive Order therefore simply requires that a responsible Executive Branch official make a judgment that the interest in maintaining the confidentiality of diplomatic discourse should be invoked with respect to each document. The declarations submitted in this case did precisely that, and they explain that disclosure of this particular document can reasonably be expected to damage the Nation's foreign relations by undermining that confidentiality.³³

³³ In any event, the present case was decided on the basis that the classified letter constituted information concerning the "foreign relations or foreign activities of the United States," not that it qualified as "foreign

c. Historical practice supports the Executive Branch's interpretation: The court of appeals' insistence that identifiable harm to national security must arise from within the four corners of the classified document—and not from the repercussions of the breach of confidentiality in its own right—is contrary to historical practice and common experience. "Secrecy is the very soul of diplomacy." F. de Callieres, *On the Manner of Negotiating with Princes* 142 (Univ. of Notre Dame Press, 1919) (A. Whyte trans.). It is thus "obvious to anyone who has been in charge of the interests of his country abroad that the day secrecy is abolished negotiations of any kind will become impossible." J. Cambon, *The Diplomatist* 30 (Philip Allan, 1931) (C. Turner trans.).

That principle was well understood by the Framers. Even before the Constitution was adopted, the Founders established a Committee of Secret Correspondence of the Continental Congress, which, true to its name, placed great emphasis on the secrecy of communications with foreign governments in its conduct of the Nation's earliest intelligence activities. See *Halperin v. CIA*, 629 F.2d 144, 157 (D.C. Cir. 1980) (citing 3 Journals of the Continental Congress 392 (1905)). Later, in 1794, President Washington refused to disclose correspondence between the French government and the United States' ambassador. See 4 Annals of Congress 34, 37-38 (1794). President Washington also withheld from Congress communications with foreign governments that underlay the negotiation of the Jay Treaty—not on the basis of particular secrets identified in each document that would harm the United States if disclosed, but because

government information." See Pet. App. 7a. Nothing in the new Executive Order altered the manner in which "foreign relations or foreign activities" information is classified. See Exec. Order No. 12,958, § 1.5(d); Exec. Order No. 12,356, § 1.3(a)(5).

[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

Curtiss-Wright, 299 U.S. at 320-321.³⁴ If the "pernicious influence on future negotiations" was considered a sufficient threat to the public interest for President Washington to decline to share foreign correspondence even with Congress, it must surely be a sufficient basis for withholding the British government's letter from the public at large under FOIA.

President Hoover similarly refused Congress's demand (S. Doc. No. 216, 71st Cong., Special Sess. (1930)) to publicize "statements, reports, tentative and informal proposals as to subjects, persons, and governments given to [him] in confidence" during negotiations over the London Treaty for the Limitation and Reduction of Naval Armaments. In words that speak directly to the court of appeals' ruling here, President Hoover explained:

The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must not allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and

³⁴ See also *The Federalist* No. 64, *supra*, at 393 ("[T]he Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.").

thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust.

*Ibid.*³⁵

d. This Court's decisions support the Executive Branch's interpretation: This Court has long recognized that the Executive Branch's ability to maintain confidential relationships is essential for the protection and advancement of the United States' national security and foreign relations interests. In *CIA v. Sims*, the Court sustained the government's denial of a FOIA request on national security grounds and, in so doing, underscored the inappropriateness of courts superintending Executive Branch judgments about the need to preserve the confidentiality of communications bearing on national security. The Court observed that, if important sources of national security information "come to think that the [United States] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the [United States] in the first place." 471 U.S. at 175. Further, the Court "seriously doubt[ed]" that potential sources of information "will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering" (or, here,

³⁵ See also pp. 17-20, *supra*; 1 Op. Off. Legal Counsel 269, 270 (1977) (where disclosure of confidential communications and notes of meetings with foreign government officials could "impair our relations with the foreign governments involved, both by breaching a pledge of confidentiality and by releasing information possibly detrimental to the interests of the other governments," the documents may be considered "state secrets"); *United States v. Reynolds*, 345 U.S. 1 (1953).

foreign diplomacy) will order the government's secrets revealed "only after examining the facts of the case to determine whether the [government] actually needed to promise confidentiality in order to obtain the information." *Id.* at 176.

In *Haig v. Agee*, the Court likewise held that "the Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance of confidentiality* so essential to the effective operation of our foreign intelligence service." 453 U.S. at 307 (emphasis added). "It is elementary that the successful conduct of international diplomacy * * * require[s] both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept." *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring).³⁶

Those cases recognize the utter unworkability of a scheme under which courts would make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been "justified" through an unspecified "initial showing" in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to foreign relations that may be taken into account. The President's singular authority to maintain secrecy is essential to the conduct of foreign affairs:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or *listen* as a representative of the nation.

* * * * *

³⁶ See also *Snepp*, 444 U.S. at 512 ("The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information."); *Arieff v. United States Dep't of the Navy*, 712 F.2d 1462, 1470 (D.C. Cir. 1983) ("[T]his is a matter in which appearance is as important as reality.").

The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

* * * * *

[The President] has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Curtiss-Wright, 299 U.S. at 319, 320 (emphasis added; internal quotation marks omitted).

The loss of important information, candid dialogue, and honest assessments by foreign governments that would follow in the wake of a judicially ordered breach of another nation's trust would deal a tremendous blow to the United States' diplomatic efforts. As in *Sims*, there is little reason for foreign governments "to have great confidence in the ability of judges" to make the "complex political [and] historical" judgments that underlie classification decisions, since judges "have little or no background in the delicate business" of foreign diplomacy. 471 U.S. at 176. In particular, if foreign governments cannot be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will, as a result, be spared the risks to their interests that may attend such exposure, they are likely to "close up like a clam," *id.* at 172, leaving the United States unable to obtain the information it so critically needs for the successful conduct of its foreign affairs.³⁷ From the foreign government's perspec-

³⁷ See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984) ("[M]uch if not all of the information * * * would not find its way into the public realm even if we refused to recognize the privilege, since under those circumstances the information would not be obtained by the Government in the first place."); cf. *Sims*, 471 U.S. at 175 (if

tive, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). The protection accorded confidences of the United States government by other nations may be eroded as well. In short, this is an area that "uniquely demand[s] single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Indeed, experience validates the State Department's expressed concern that breach of a foreign government's trust will reverberate through our diplomatic relations. Disclosure of the Pentagon Papers impaired our diplomatic relations with foreign governments who were concerned about the United States' ability to preserve their confidences. Secretary of State William Rogers explained:

I've had several conversations with foreign governments * * * who've expressed their concern about discussions with us on matters that are confidential. * * * Now, if those governments feel that those discussions cannot be held in confidence, then we have a serious problem which can be very harmful to the national interest, not only in the long run but in the short run. * * * For example, I had one ambassador who came in and said that our Government had assured his Government that the role that they played in attempting to work out a peaceful settlement in Vietnam would never be disclosed. And he said "I'm not going to trust your Government from now on. You've disclosed it."

65 State Dep't Bull. 79 (1971); see also *New York Times*, 403 U.S. at 762-763 (Blackmun, J., dissenting). Similarly, the Mexican government's failure to preserve the confidentiality

confidentiality is not protected, "many [sources] could well refuse to supply information to the Agency in the first place").

of the United States' settlement efforts derailed peaceful efforts to avert the Mexican War. K. Bauer, *The Mexican War 1846-1848*, at 21-26 (1974).³⁸

Preserving the confidentiality of communications in the area of international law enforcement and extradition is critical in its own right. Under the extradition treaty between the United States and the United Kingdom, like most of the extradition treaties entered into by the United States in the last fifteen years, the government from whom extradition is requested is obligated to represent the requesting State in the extradition proceedings.³⁹ When extradition is contested, as it was by respondent's client, the requesting and sending governments may spend years

³⁸ On a more global level, preserving the confidentiality of communications over time builds trust between government officials, on both an institutional and a personal level. Such banked trust may often be a critical factor in allowing governments to prevent the escalation of problems, to defuse confrontations, and to manage crises when they arise. Cf. *Van Atta v. Defense Intelligence Agency*, No. 87-1508, 1988 WL 73856 (D.D.C. July 6, 1988) (confidential communications of Vietnamese government properly protected under Exemption 1 because breach of that government's trust would jeopardize ongoing and future efforts to account for soldiers missing in action); *U.S. Gov't Information Policies and Practices The Pentagon Papers (Part III): Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess. 900-901 (June 30 & July 7, 1971) (testimony of William Macomber, Deputy Under Secretary, Dep't of State) ("I think it is equally important to remember that diplomacy cannot function if we cannot deal with other governments in the world and especially with governments that are not particularly friendly to us, if we cannot deal with them on a basis of confidence—if they cannot speak to us in confidence and have confidence that we will protect from disclosure what they are saying to us. If you remove the element of confidentiality from the diplomatic process, you destroy the diplomatic process. * * * [I]n many places in the world, as we conduct our diplomatic processes, if we can't keep our mouth shut, we haven't got any chance at all of moving toward peace.").

³⁹ See Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, art. XIV, 28 U.S.T. 229, 233.

engaged in sensitive communications pertaining to issues raised in the legal proceedings, the location of fugitives, investigative sources and methods, investigative or prosecutorial strategies, security issues, humanitarian concerns, and the domestic and diplomatic repercussions of the extradition. One government may question the strength of a case or the commitment of the other government to a pending extradition matter, or it may seek to assuage particular political or humanitarian concerns in the sending country. With many countries whose legal systems differ from ours, concerns about the nature of the criminal proceedings, the motivation for the prosecution, or conditions of incarceration may be expressed confidentially that neither government would wish to have voiced publicly.

With respect to international law enforcement more generally, preserving the trust and ongoing cooperation of foreign governments and protecting the confidentiality of the candid information they share—as participants in transnational efforts to prevent terrorism, to locate and bring to justice international fugitives, and to combat (for example) narcotics trafficking, alien smuggling, and illegal weapons sales—represent distinct foreign policy objectives, separate and apart from any individual criminal matter. Given the vital importance of cultivating an atmosphere of trust in which candid and timely exchanges of information can be encouraged, “[g]reat nations, like great men, should keep their word.” *Sims*, 471 U.S. at 175 (quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)). “Effectiveness in handling the delicate problems of foreign relations requires no less.” *United States v. Pink*, 315 U.S. 203, 229 (1942).⁴⁰

⁴⁰ See also 65 State Dep’t Bull. at 80 (Secretary of State Rogers) (“If we can’t keep our word as a nation * * * then we’re going to have serious difficulty in dealing with other nations. It’s as simple as that.”).

Accordingly, this Court should reject the court of appeals’ counterintuitive and perilous conclusion that no threat of “harm” to the “foreign relations of the United States” (Exec. Order No. 12,958, § 1.1(l)) is presented by the prospect of a foreign government limiting or terminating negotiations or cooperation with the United States on a sensitive matter, or refusing to afford reciprocal protection for the confidences of the United States, if its confidences are not preserved. The “changeable and explosive nature of contemporary international relations,” *Haig*, 453 U.S. at 292, and the breach of trust that disclosure of the British government’s confidences would cause in foreign relations generally and in the delicate arena of international law enforcement and extradition in particular, warrant reversal of the court of appeals’ judgment.

2. FOIA requires utmost deference to the Executive Branch’s judgment that disclosure of the British government’s letter will damage national security by breaching that government’s trust

The court of appeals held that the State Department declarations discussing the harm that release of the British Government’s letter would cause to the Nation’s foreign relations merited no deference in this FOIA suit because the Executive Branch must “justify” judicial deference to its foreign relations judgments through an unspecified “initial showing.” Pet. App. 16a. That conclusion is inconsistent with the historical, constitutionally based tradition of judicial deference to the Executive in such matters (see pp. 15-26, *supra*), and with the 1974 amendments to FOIA, in which Congress enacted Exemption 1 in its present form. Pub. L. No. 93-502, § 2(a), 88 Stat. 1563.

The amendment to Exemption 1 was enacted in response to this Court’s decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). Prior to the 1974 amendments, Exemption 1 protected any matters “specifically required by

Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. 552(b)(1) (1970). In *Mink*, the Court found "wholly untenable any claim that [FOIA] intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen," and it likewise rejected "the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification stamp so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter." *Id.* at 84. Congress amended FOIA in 1974, in part, to "override" *Mink* "with respect to *in camera* review of classified documents," S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974), and to permit courts to "examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions," 5 U.S.C. 552(a)(4)(B). Congress also amended Exemption 1 itself to add its second condition on withholding—that the matters involved "are in fact properly classified pursuant to [an] Executive order." The circumstances of the enactment of the 1974 amendments demonstrate, however, that they are properly read to respect the Executive's paramount authority in protecting national security information.

When the proposed amendments to FOIA were before a Conference Committee, President Ford wrote a letter in which he objected that the bill "place[d] the burden of proof upon an agency to satisfy a court that a document * * * [was] properly classified," and he urged that the amendments "not usurp my Constitutional responsibilities as Commander-in-Chief." 120 Cong. Rec. 33,158 (1974). President Ford further explained that his "great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that release of a document may have upon our national security." *Ibid.* The President proposed specifying

that a court could order release of a document only if it found the "classification to have been arbitrary, capricious, or without a reasonable basis." *Ibid.*

"[T]he ensuing conference actions on these matters were responsive to [the President's] concerns and were designed to accommodate further interests of the Executive Branch." 120 Cong. Rec. 33,159 (1974) (Letter from Senate Kennedy and Rep. Moorhead to President Ford (Sept. 23, 1974)). The Conference Report expressed Congress's intent that courts, "in making *de novo* determinations in section 552(b)(1) cases," accord "substantial weight" to an agency's "unique insights into what adverse [e]ffects might occur as a result of public disclosure," and thus of the necessity of classification in the national security area. See S. Conf. Rep. No. 1200, *supra*, at 11. Members of Congress echoed that expectation.⁴¹

President Ford vetoed the 1974 amendments to FOIA, in part because:

[T]he courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles.

H.R. Doc. No. 383, 93d Cong., 2d Sess. III (1974). The President proposed, instead, that courts be required to

⁴¹ See 120 Cong. Rec. 6808 (1974) (Rep. McCloskey) (1974 FOIA amendments are enacted "with the confidence" that courts "will * * * be very reluctant to override" an agency decision "relative to declassification of such information"); *id.* at 34,166 (Rep. Moorhead) ("[T]he court should give great weight to an affidavit by the Department that this was properly classified."); *ibid.* (Rep. Erlenborn) ("great weight").

uphold the classification decision if it has any "reasonable basis to support it," *ibid.*, that is, unless the classification decision is "arbitrary, capricious, or without a reasonable basis," 120 Cong. Rec. at 33,158. Congress ultimately overrode the President's veto, but not without agreement that, under the President's reading, the provision for judicial review is "an obviously dangerous provision," and that the courts therefore should review classification decisions in "exactly the way" the President proposed. House Comm. on Gov't Operations & Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 Source Book*, 94th Cong., 1st Sess. 405 (1975). (Rep. Moorhead, Chairman of the House Conferees); see also *id.* at 416 (Rep. Erlenborn) ("great weight" is due agency judgments).

Thus, the 1974 amendments were intended to give courts some role in reviewing decisions to withhold information under Exemption 1, and thereby to overrule *Mink*. Congress intended that role to be narrow and appropriately deferential, consistent with the separation of powers and the President's responsibilities under the Constitution for the conduct of national defense and foreign affairs. The Ninth Circuit departed dramatically from the role Congress carefully crafted for courts, by denying deference to and by second-guessing the foreign policy judgment of the Executive Branch. Yet, it is only by cleaving strictly to the standard of "substantial weight" Congress intended when Exemption 1 was enacted in 1974—and thus limiting judicially ordered disclosures to those instances where the Executive Branch's explanation of the harm to national security is implausible or foreclosed by the plain terms of the Executive Order—that a court can conform its FOIA review to the Constitution's command that the "utmost deference" be accorded the Executive's judgment regarding the need for secrecy in the conduct of foreign relations. See *Nixon*,

418 U.S. at 710.⁴² Correspondingly, the ability of a court to order disclosure where it concludes that the Executive's explanation of the harm to the national security is implausible (even after giving it utmost deference) or contrary to the plain terms of the Executive Order—and to review a document *in camera* in appropriate circumstances—meets the concerns identified in the separate opinions in *Mink* that courts not be required by Exemption 1 to give "blind acceptance to Executive fiat," 410 U.S. at 95 (Stewart, J., concurring), or to sustain withholding even where the information might bear no "discernible relation" to the national security, *id.* at 110 (Douglas, J., concurring).

The utmost deference standard comports with FOIA's provision for de novo district court review, 5 U.S.C. 552(a)(4)(B). Congress's reference to de novo review must be read against the well-established judicial tradition of affording expert agency judgments substantial deference in the course of deciding legal questions over which the court has plenary authority.⁴³ Indeed, this Court reaffirmed just last Term that a statutory provision for de novo review does not license courts to disregard relevant agency interpretations and judgments.⁴⁴ Likewise, the Administrative Procedure Act directs reviewing courts to "decide all relevant questions of law" and to "interpret * * * statutory provisions," 5 U.S.C. 706, yet those provisions have never been

⁴² See *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("Since the agency assessments are both plausible and factually uncontradicted, the trial court would have been remiss in disregarding them."); *Halperin*, 629 F.2d at 149, 150 ("plausible").

⁴³ See *United States v. Wilson*, 503 U.S. 329, 336 (1992) ("It is not lightly to be assumed that Congress intended to depart from a long established policy.").

⁴⁴ *United States v. Haggard Apparel Co.*, 119 S. Ct. 1392, 1399 (1999) (Court of International Trade must accord Chevron deference to Customs regulations despite statutory provisions directing de novo decision-making).

read to foreclose appropriate deference to agency judgments. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Application of that background principle of judicial deference "is especially appropriate," moreover, when Executive Branch officials "exercise especially sensitive political functions that implicate questions of foreign relations." *Aguirre-Aguirre*, 119 S. Ct. at 1445.⁴⁵ Accordingly, FOIA's reference to de novo review should not be construed to create constitutional problems that the Act's text, structure, and legislative history eschew.⁴⁶

That is especially so in light of the 1996 amendments to FOIA that provide for the disclosure of electronic records. Pub. L. No. 104-231, 110 Stat. 3049. In those amendments, Congress added a sentence to FOIA's judicial review provision, immediately following the one that provides for de novo review, stating that, "[i]n addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to the technical

⁴⁵ See also *Sims*, 471 U.S. at 179 (holding that the national security judgments of Executive Branch officials "are worthy of great deference," notwithstanding FOIA's provision for de novo review.); *Church of Scientology v. IRS*, 792 F.2d 153, 156 (D.C. Cir. 1986) (Silberman, J., concurring) ("Thus, Congress recognized that even within the de novo review that it directed courts to conduct under FOIA, there was room for deference to the agency on factual issues relating to the availability of an exemption in a particular case within the agency's delegated area of responsibility."), *aff'd*, 484 U.S. 9 (1987); *Halperin*, 629 F.2d at 148 ("limited standard for de novo review" applies in "national security FOIA case[s]"). That *Sims* involved Exemption 3 of the FOIA, rather than Exemption 1, is immaterial, because de novo review applies to both. See *Halperin*, 629 F.2d at 148 ("The logic of this judicial review standard applies equally to all national security FOIA cases, whether they arise formally under Exemption 1 or Exemption 3.").

⁴⁶ See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (construing statute to avoid separation-of-powers concerns).

feasibility" of making records available in electronic format. See Pub. L. No. 104-231, § 6, 110 Stat. 3052; see 5 U.S.C. 552(a)(4)(B) (Supp. IV 1998). The reference to "any other matters" on which a court "accords substantial weight" must include the established practice under Exemption 1 of accords that measure of deference to Executive classification decisions, consistent with the 1974 Conference Report's assurance that courts would give "substantial weight" to agency affidavits explaining the basis for classification. See pp. 45-46, *supra*. Thus, FOIA's text now provides the precise "substantial weight" formulation of deference to Executive decisions that Congress intended under FOIA in the national security area and that the Constitution requires.

Given that the rule of utmost deference to Executive Branch classification decisions and foreign policy judgments is firmly embedded both in our national experience and in the relevant constitutional and statutory framework, the Ninth Circuit plainly erred in holding (Pet. App. 16a) that the Executive Branch must "justify" judicial deference to its foreign relations judgments through an unspecified "initial showing." The State Department declarations in this case plainly identified and described the harm to national security that disclosure threatened—interference with pending and future extradition matters and cooperative law enforcement efforts with Great Britain; a breach of trust between governments; and a larger threat to the United States' ability to receive candid, confidential information from foreign governments and to insist on equivalent protections for its own communications. See Pet. App. 52a-54a, 56a-58a. That explanation bore a plausible (indeed, compelling) connection to the Nation's foreign policy and national security, and respondent introduced no affirmative argument or evidence to the contrary. Because the Executive Branch thus brought the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" squarely to bear (*Curtiss-Wright*,

299 U.S. at 320) on the litigation, the judiciary's constitutional and statutory obligation to afford the Executive Branch the utmost deference in its foreign policy judgment was triggered. The court of appeals had no authority to insist on more.⁴⁷

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DAVID R. ANDREWS
Legal Adviser
Department of State

STEVEN GARFINKEL
Director
Information Security
Oversight Office

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney
General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor
General

LEONARD SCHAITMAN
JOHN P. SCHNITKER
AUGUST E. FLENTJE
Attorneys

OCTOBER 1999

⁴⁷ We previously lodged copies of the classified document under seal with the Clerk of this Court.

STATUTORY APPENDIX

The Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. IV 1998) provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(1a)

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member

of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney

fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and

legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency

to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of

an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the

requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management

and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) “agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) “record” and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(As amended Pub. L. 104-231, §§3-11, Oct. 2, 1996, 110 Stat. 3049-3054.)

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit

BRIEF OF THE RESPONDENT

CHARLES J. COOPER*
ANDREW G. McBRIDE
DAVID H. THOMPSON
MARGARET A. RYAN
COOPER, CARVIN
& ROSENTHAL, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600
* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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STATEMENT

1. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, was originally enacted in 1966 as an amendment to Section 3 of the Administrative Procedure Act. *See* Pub. L. No. 89-487, § 3, 80 Stat. 259, 251 (1966). As this Court has recognized many times, FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). Because "disclosure, not secrecy, is the dominant objective of [FOIA]," *id.* at 361, the exemptions to disclosure contained in the statute are to be narrowly construed. *See Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.") (citations omitted). It is also common ground (except apparently for the government's opening brief in this case) that the government bears the burden of proof in justifying the invocation of any exemption. *See Department of State v. Ray*, 502 U.S. 164, 173 (1991) ("[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.") (citations omitted). Courts do not accord any deference to agency decisions to withhold information from the public; rather, the statute specifically provides that "the court shall determine the matter de novo." 5 U.S.C. § 552(a)(4)(B); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755-56 (1989).

2. FOIA contains nine specific exemptions from the general duty of disclosure it imposes. 5 U.S.C. § 522(b)(1)-(9). Section 552(b)(1), known as Exemption 1, allows for the withholding of matters whose secrecy is necessary in the interest of national security and foreign policy. Exemption 1 is unique among the nine exemptions in that authority to establish the criteria for withholding information is assigned to the unfettered discretion of the Executive. Under this scheme, neither Congress nor the federal courts

may intrude upon the Executive's decisions regarding what categories of material are, or more aptly in this case, are not, to be classified in the name of national security.

Various Administrations have, through executive order, struck differing balances between the need for government secrecy and for the free flow of information regarding government activities. The first executive order prescribing a classification system for government secrets was promulgated by President Franklin D. Roosevelt in 1940. Exec. Order No. 8381, 3 C.F.R. § 634 (1941). In 1951, President Truman promulgated a comprehensive and highly restrictive regime for the protection of state secrets. Exec. Order No. 10,290, 3 C.F.R. § 789 (1951). President Truman's order was roundly criticized as too restrictive, and a succession of executive orders from President Eisenhower through President Carter gradually relaxed the standards for classification. See Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 Cornell L. Rev. 690, 690 n.3 (1984). This trend culminated in President Carter's 1978 executive order that required classifying officials to point to "identifiable damage" to the national security from disclosure. That order also provided that any uncertainty as to disclosure should be resolved in favor of public access. See Exec. Order No. 12,065, 3 C.F.R. § 190 (1979) (hereinafter "Carter Order").

On April 2, 1982, President Reagan issued executive order No. 12,356, superseding the prior order promulgated by President Carter. Exec. Order No. 12,356, 3 C.F.R. § 166 (1983) (hereinafter "Reagan Order").¹ The Reagan Order significantly broadened the power of executive agencies to classify information pursuant to national security and foreign policy concerns. For example, it reestablished the presumption in favor of classification in the case of doubt, Opp. Cert. App. 3a, and it eliminated the requirement that a classifying

¹ The Reagan Order is reprinted in the Appendix to Respondent's Brief in Opposition to Certiorari ("Opp. Cert. App.") 1a-25a.

official point to "identifiable damage" from disclosure. *Id.* 7a. Most important here, the Reagan Order contained the following presumption: "Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security." *Id.* (emphasis added). The term "foreign government information" was defined to include "information provided by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence." *Id.* 24a.²

On April 17, 1995, President Clinton issued an executive order which reversed President Reagan's protective approach to national security information and went beyond even President Carter's executive order in discouraging classification and promoting disclosure. Exec. Order No. 12,958, 3 C.F.R. § 333 (1996) (hereinafter "Clinton Order").³ Designed specifically to "emphasize our commitment to open Government," the Clinton Order reinstated the Carter Order's presumption in favor of disclosure rather than classification in the case of any uncertainty. Pet. App. 65a, 68a. The Clinton Order specifically eliminated the presumption that the release of diplomatic communications between governments would cause harm to the national security. Instead, for *all* classification decisions, the Clinton Order requires the original classification authority to be "able to identify or describe the damage"

² President Reagan's Executive Order was roundly criticized as overly protective by academics, see generally Cheh, *supra*; Anthony R. Klein, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 FED. COM. L.J. 433 (1990), by the press, see Floyd Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22-23, and by some members of Congress who proposed legislative intervention to reestablish the more open Carter regime. See S. 1335, 98th Cong., 1st Sess. § 3 (1983) (bill sponsored by Sen. Durenberger to amend Exemption 1 to reverse Reagan Order).

³ The Clinton Order is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") 65a-111a.

to national security that would flow from disclosure. *Id.* 68a. Moreover, unlike the Reagan or Carter Orders, the Clinton Order adopted a specific (and limiting) definition of the grounds for classification. Section 1.1(l) of the Clinton Order defines "[d]amage to the national security" to mean "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." *Id.* 67a-68a.

President Clinton's signing statement, issued in conjunction with the new executive order, declared the President's intention "to bring the system for classifying . . . national security information into line with our vision of American democracy in the post-Cold War world." 31 WEEKLY COMP. PRES. DOC. 633 (Apr. 17, 1995); Opp. Cert. App. 26a-28a. The President noted that "[t]his order establishes many firsts: Classifiers will have to justify what they classify." *Id.* 27a. The statement makes particularly clear that the Clinton Order eliminates any categorical presumptions in favor of classification, and instead requires a particularized showing under its new, more demanding standards:

[W]e will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. . . . And, we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.

Id. (emphasis added).⁴ Implementation of the Clinton Order, the President stated, "will greatly reduce the amount of

⁴ Evidently, this new policy favoring disclosure over classification was not supported by all the affected agencies within the Executive Branch. See, e.g., R. Jeffrey Smith, *CIA, Others Opposing White House Move to Bare Decades-Old Secrets*, Washington Post, Mar. 30, 1994, at A14.

information that we classify in the first place and the amount that remains classified." *Id.* 28a.

Several federal courts have already taken note of the new, significantly less restrictive classification standards of the Clinton Order. See, e.g., *Summers v. Department of Justice*, 140 F.3d 1077, 1082 (D.C. Cir. 1998) ("newer order is less restrictive"); *Halpern v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999) (noting "more liberal standards of executive order 12,958"); *McErlean v. Department of Justice*, No. 97 Civ. 7831, 1999 U.S. Dist. LEXIS 15544, at *14 n.5 (S.D.N.Y. Sept. 30, 1999) ("[N]ewer order is less restrictive, reflecting the dramatic changes in national security concerns in the late 1980s.") (citations omitted). Indeed, in this case, the Department of Justice actively litigated for application of the more restrictive standards of the Reagan Order. See Pet. App. 26a-27a. It is the interaction of the new, significantly more demanding standards for classification established by the Clinton Order with the disclosure requirements of FOIA that is at issue in this case.

3. Respondent Leslie R. Weatherhead is a lawyer in private practice in Spokane, Washington. Respondent represented Sally-Anne Croft, a British national, who was a member of the spiritual community in central Oregon led by Bhagwan Shree Rajneesh. In May 1990, Croft and another British citizen, Susan Hagan, were indicted by a federal grand jury in Oregon and charged with conspiracy to murder a federal officer and conspiracy to engage in the illegal interstate transportation of firearms. No attempt to carry out the conspiracy was ever made. Sometime after their indictment, the United States requested Croft's and Hagan's extradition from the British government. See *United States v. Croft*, 124 F.3d 1109, 1113-15 (9th Cir. 1997).

The United States' request for extradition was attended by considerable controversy in Great Britain. Many members of the House of Lords worried openly whether Croft and Hagan could receive a fair trial in Oregon in light of "the political scene within the State [of Oregon], and the prejudice (by no means confined to Oregon) against the cult of which the two ladies were members." H.L. Jour., June 6, 1994, at

1055 (Statement of Lord Pearson of Rannoch) (quoting letter of March 23, 1993 from Lord Scarman to the Secretary of State for Home Affairs, the Right Honorable Kenneth Clarke). In their affidavits in support of extradition, Department of Justice lawyers specifically reassured the British that any prejudice could be dealt with under American procedural law by a change of venue as well as other mechanisms to ensure an impartial petit jury. Pet. App. 2a-3a.

On or about July 28, 1994, Croft and Hagan were extradited from Great Britain to the United States. The British government extradited Croft and Hagan on the first count of the indictment, but did not authorize extradition on count two. As the Justice Department informed the court in its pleadings: "The Home Secretary did not, due to a lack of dual criminality, authorize the defendants' extradition for the crime charged in Count Two of the Indictment." United States' Response in Opposition to the Defendants' Motion to Dismiss at 9, *United States v. Croft, et al.*, Nos. CR 90-146-2 & CR 90-146-4 (D. Or.) (filed Oct. 31, 1994).⁵ Thus, Croft and Hagan were tried only on the first count of the indictment.

Shortly after her first appearance, Croft requested a change of venue based on a widespread and pervasive prejudice against the Bhagwan Rajneesh and his "cult" throughout the District of Oregon. The government opposed Croft's request for a change of venue. In fact, despite the explicit assurances given to the British government, the federal prosecutors opposed even an evidentiary hearing to allow the defendants to present evidence of local prejudice against the Bhagwan's followers.

On November 16, 1994, respondent was informed in writing of the existence of a letter dated July 28, 1994, from the British Home Office to George Procter of the Department of Justice (hereinafter "Home Office letter"). See note 18, *infra*. Believing that the letter was relevant to the venue question, on November 29, 1994, respondent requested a copy

⁵ We have lodged a copy of this government pleading in the criminal case with the Clerk of the Court.

of the letter under the authority of FOIA from both the Departments of Justice ("Justice") and the Department of State ("State"). Joint Appendix ("J.A.") 10-11. Despite repeated requests to both Justice and State, respondent received no definite response to his request for over one year. J.A. 12-28. In May 1995, Justice finally acknowledged its possession of the letter and referred respondent's request to State. *Id.* 26-27.

On August 4, 1995, State wrote to the British Embassy, asking for British concurrence to release the letter: "Before complying with this request, we would appreciate the concurrence of your government in the release of this document. Should your government wish to release only a part of this material, please indicate with brackets the portions you wish withheld." Opp. Cert. App. 29a. The British Government demurred because, in its view, "the normal line in cases like this is that all correspondence between governments is confidential unless papers have been formally requisitioned by the defence." *Id.* 30a. The British Government also indicated a more generic concern: "Our Library and Records Department would also be concerned about the precedent set by releasing even part of the letter since any such development would quickly become common knowledge amongst lawyers dealing with extradition matters." *Id.* 30a-31a.⁶ Nothing in State's letter to the British or the British response identified anything about the content of this letter that justified classification.⁷

On November 17, 1995, respondent filed a complaint in federal district court for the Eastern District of Washington

⁶ Apparently, this exchange of diplomatic communications between the United States and Great Britain, regarding respondent's FOIA request, was not subject to the same unswerving canon of diplomatic confidentiality that petitioners now claim clothes all government to government communications.

⁷ The trial of Hagan and Croft began in the District of Oregon on June 27, 1995 and was concluded on July 28, 1995. Thus, the unexplained delays in responding to Weatherhead's FOIA request had the effect of precluding the possibility that the district court in the criminal case could consider the contents of the British letter in addressing the venue question.

under FOIA, seeking to compel Justice and/or State to produce the letter. J.A. 7-9. On December 11, 1995, over a year after respondent's initial FOIA request, State finally informed respondent that it had classified the letter. *Id.* 42-43. Again, nothing about the nature or content of the letter was cited to justify classification other than the British request that "it be protected as confidential information." *Id.* 43.

With this administrative background, on February 16, 1996, respondent moved for summary judgment. Petitioners produced a declaration from Mr. Peter M. Shiels, an administrative official in State's Office of Freedom of Information, Privacy and Classification Review. Pet. App. 48a-54a. The Shiels Declaration relied entirely upon diplomatic confidentiality as a grounds for classification. Thus, the declaration referenced "a general understanding among governments that confidentiality is normally to be accorded exchanges between governments." *Id.* 52a. The declaration also alluded to the subsequent British declination to authorize release of the document. *Id.* Mr. Shiels' Declaration concluded, "the Department of State classified the document Confidential to protect its confidential character as foreign government information." *Id.*

On March 29, 1996, the district court rejected the government's proffered justification for withholding the letter and granted summary judgment for respondent. *Id.* 29a-42a. The court noted that neither Justice nor State had treated the letter as confidential upon receipt and, in fact, "[n]either asserted an exemption until more than a year after [FOIA] request, and then only at the request of Great Britain." *Id.* 35a.

The court rejected the notion that general and conclusory representations regarding diplomatic confidentiality could satisfy the new standards of the Clinton Order. *Id.* 39a-40a. The court found that petitioners' rationale gave the foreign government a veto over FOIA disclosure, "thereby defeating the public policy of providing properly requested information." *Id.* 40a. Finally, the district court found that petitioners had not made an adequate showing of why certain portions of the letter were not segregable. *Id.* The court could not make

the required segregability findings because the Shiels Declaration did not provide adequate record facts to develop those findings. *Id.*

Petitioners filed a motion to alter or amend the judgment and to have the district court examine the letter in camera. The Kennedy Declaration, Pet. App. 55a-59a, was submitted as "new evidence" in support of that motion. *Id.* 22a-23a. The district court found that the Kennedy Declaration did little more than recite the same generalized concerns as the Shiels Declaration. *Id.*⁸ Like the Shiels Declaration, the Kennedy Declaration relied upon "a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials." *Id.* 56a; *see also id.* 59a (citing "the expectation of the confidentiality of foreign government information and the explicit confirmation of that expectation by the British Embassy letter"). While not disputing that such a tradition existed, or that the British had invoked it here, the district court quite properly looked to the text of the Clinton Order itself:

There may be historical practices and protocols in diplomatic circles supportive of defendants' position, and probably are. In recognition of that history, Congress could have shielded all materials either generated or held by [State] from FOIA disclosure, but chose instead to defer to the Executive Branch. The Executive Branch could have shielded all materials either generated or held by [State] from FOIA disclosure, and for all practical purposes did so in 1982 when EO 12356 [Reagan Order] was signed. In 1995, the current administration eliminated the presumption of harm found in former EO 12356 § 1.3(c) and now requires a showing of harm

⁸ In fact, as the district court noted, the Kennedy Declaration's references to State's letter of inquiry to the British government regarding Weatherhead's FOIA request cut against their claims of categorical confidentiality. State's letter strongly suggested that State intended to release the letter absent British protest. *See id.* 40a.

on a case-by-case basis. EO 12958 § 1.2(a)(4) [Clinton Order]. This is a major shift in policy. Defendants might not view this evolution as prudent policy, but the answer is to direct their concerns to the President, not to ask courts to rewrite an executive order by inserting language the President pointedly deleted.

Id. 25a.

Despite the fact that the district court rejected petitioners' "new evidence" and further rejected their attempts to ignore or amend the text of the Clinton Order *pro tanto* through State Department declarations, the district court nonetheless granted reconsideration, inspected the letter in camera, and ordered the letter withheld. The district court was "unable to say why" the letter should be withheld, because, in its view, doing so would necessarily cause the harm sought to be avoided. *Id.* 27a. Nor did the district court cite any of the standards of the Clinton Order as a basis for reversing itself, *id.* 27a-28a, or make any specific findings as to segregability. *Id.*

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment and ordered the letter released under FOIA. Pet. App. 1a-20a. The court of appeals found, as the district court had, that both of the possible harms discussed in the Sheils and Kennedy Declarations – "damage caused by the act of disclosing a letter between foreign governments, regardless of its particular contents, and damage caused because the letter concerns international extradition proceedings," *id.* 10a – were insufficient as a matter of law under the standards established by the Clinton Order. The court of appeals reasoned that, under the Clinton Order, "it is clear that *all* information exchanged between foreign governments is not exempt from FOIA disclosure, not even all information that another government prefers to keep confidential." *Id.* 14a (emphasis in original). As the Ninth Circuit noted, the government was seeking essentially the same analysis as applied under the Reagan Order, arguing that harm to the national security should be presumed without any showing that disclosure of the specific information itself

could be injurious. Noting that the Clinton Order could have categorically shielded all diplomatic communication from disclosure under FOIA, the court of appeals emphasized that President Clinton specifically decided instead "to make it easier for the public to view material from foreign governments by eliminating the presumption of harm found in the prior Executive Order, Exec. Order 12356 § 1.3(c), and requiring the U.S. government to identify the particular damage that would result from releasing the information." *Id.*

Nor could the Ninth Circuit accept the proposition that extradition communications were categorically exempted from disclosure. The court noted that State had been willing to release the letter prior to British resistance and that the British Home Office itself had acknowledged a defense right to extradition letters upon proper request. *Id.* 15a. This record hardly supported a categorical exception to the Clinton Order for extradition letters.

The court of appeals conducted its own in camera review, and expressly accorded deference to the government's characterization of the letter and potential harms from release. *Id.* 17a. The court concluded:

We have reviewed the letter *in camera*, and carefully considered its contents, including the "sensitivity, value and utility" of the information contained therein. Having done so, we fail to comprehend how disclosing the letter at this time could cause "harm to the national defense or foreign relations of the United States." The letter is, to use Mr. Kennedy's term, "innocuous." Even after giving the act of classification the deference to which it is entitled, we are compelled to conclude that disclosure of the letter pursuant to Weatherhead's FOIA request could not reasonably "be expected to result in damage to the national security."

Id. (citations omitted in original). Judge Silverman dissented. *Id.* 18a-20a. He found that the British insistence on confidentiality and the protocols recited by the Sheils and Kennedy declarations were sufficient to justify withholding the letter. *Id.* 18a-19a. Judge Silverman's dissent did not identify or

describe any specific harm flowing from the content of the letter, or dispute the majority's characterization of the letter itself as "innocuous."⁹

SUMMARY OF ARGUMENT

This is not, as petitioners would have it, a case about separation of powers. Rather, it is a case about the rule of law. Under Exemption 1 of FOIA, the Executive, in his sole discretion, establishes both the substantive and procedural criteria for classification. FOIA is completely indifferent to the balance struck by the Executive between open government and an informed citizenry on the one hand, and the secrecy necessary to effective management of the foreign relations and national security of the United States, on the other. The President retains plenary authority to provide that all diplomatic communications, or any category thereof, no matter how routine or innocuous, should be classified and remain so in perpetuity, thus maximizing fully candid diplomatic exchange. On the other hand, the President also remains free to adopt a document-specific approach, in which classifiers must point to and articulate certain specific harms threatened by disclosure of the specific information at issue – an approach that does not codify every diplomatic convention or foreign preference for secrecy. Under FOIA, the courts may not intrude upon the balance struck by the Executive. They are granted the more limited and quintessentially judicial task of ensuring that the Executive Branch follows its own, pre-established criteria for classification, thus vindicating a principle even older and more venerable than the separation of powers – the rule of law.

⁹ At oral argument in the court of appeals, Judge Silverman expressed the view that the content of the letter was innocuous. "I am not a diplomat, I don't know the intricacies of the geopolitical situation at the time, but I looked at the letter today and, honestly looking at it, I can't tell what it is that makes it top secret." Transcript of Oral Argument at 34, *Weatherhead v. United States*, No. 96-36260 (9th Cir. Apr. 8, 1998) (statement of Judge Silverman).

President Clinton has adopted a balance favoring disclosure over diplomatic secrecy in an executive order accompanied by representations of a new and unprecedented era of government openness permitted by the end of the Cold War. A presumption that disclosure of diplomatic communications would harm the national security, contained in both the Carter and Reagan Orders, was eliminated in favor of a requirement that the classifying authority identify and describe a particular harm threatened by disclosure of the specific information at issue. Under this new classification regime, neither the mere recitation of general canons of diplomatic confidentiality nor a particular preference for secrecy voiced by a foreign government can suffice. Such a result would simply resurrect the Reagan Order's presumption of harm in the guise of State Department affidavits. Such an approach also conflicts directly with the text and structure of the Clinton Order, which provides, by definition, that all "foreign government information" is exchanged in confidence, *but still requires that some additional showing of specific and identifiable harm to the national security be made.*

Neither Congress in FOIA nor the Ninth Circuit in this case arrogated to itself any of the Executive's primary constitutional authority in the areas of foreign relations and national security. The Ninth Circuit simply held the Executive to the terms of its own executive order, as FOIA requires. It did not dispute the Executive's representations that all diplomatic communications are exchanged in confidence, that the British government wished the letter kept confidential, that the United States' relationship with Britain is an important one, or even that the relationship might suffer if the letter is released despite British protest. It gave deference to the State Department's unique expertise in the field of foreign relations and accepted all of these representations. These factors simply do not satisfy the plain requirements of the new Clinton Order – which expressly makes sacrifices in the area of diplomatic secrecy in the name of open government. Some harm other than breach of a foreign government's implied or express expectation of confidentiality must be shown.

In order to induce this Court to save them from the text of their own executive order, petitioners are reduced to twisting both the Order itself and the text and history of FOIA. What was hailed by President Clinton in his signing statement as a sea change in government secrecy, this Court now is told only authorizes disclosure of such things as "routine scheduling information or congratulatory/condolence messages from certain governments." Pet'r Br. 34.

The Ninth Circuit correctly held that what petitioners call "act of disclosure" harm is, on these facts, nothing more than a claim that disclosure of any and all diplomatic communications harms the national security, which is precisely the presumption that the Clinton Order specifically abandoned. Since the government has never identified or described anything about the specific information contained in the letter that could cause any harm, the court of appeals properly concluded that the letter must be released.

Nor should this Court accept petitioners' invitation to rewrite the text and history of FOIA. The 1974 Amendments were expressly intended to overrule this Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), and give the courts authority to review de novo the ultimate issue of whether the Executive had properly applied the law, in this case his own executive order. Petitioners' suggestion that Congress, in resoundingly overriding President Ford's veto of the 1974 Amendments, somehow acceded to his request for highly deferential judicial review of classification decisions, elevates the misuse of "legislative history" to new heights. Even absent FOIA, federal courts are empowered to ensure that the Executive follows federal law – including his own executive orders. If petitioners have found that the real world consequences of an honest implementation of the new executive order are unacceptable, their remedy is to amend it, not to twist and bend both FOIA and the order to achieve the same protection of diplomatic confidentiality as the Reagan Order.

Finally, portions of this letter may have been disclosed to the district court in the related criminal action and are otherwise in the public domain. Discussion in the letter about the procedural aspects of a criminal case where the defendants

have been tried, convicted, and served their sentences cannot plausibly be classified as national security information. At a minimum, therefore, the case should be remanded for the district court to conduct a proper segregability review under any new interpretation of the executive order announced by this Court.

ARGUMENT

Petitioners devote the bulk of their opening brief to marshalling historical and judicial precedents in support of a proposition with which respondent has no quarrel: that "foreign policy [is] the province and responsibility of the Executive." Pet'r Br. 16 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988)) (further citation omitted). This is simply not a case, however, that pits Congress or the courts against the Executive. As petitioners acknowledge elsewhere in their brief: "Congress did not attempt to restrict Executive Branch classification judgments to Congress' vision of harm to the national security or the standards articulated in FOIA itself." *Id.* 29. It is the Executive's adherence to his own policy judgment regarding diplomatic confidentiality that is at issue in this case. As we demonstrate below, the Executive's decision to withhold this letter is contrary to the plain language and structure of his own executive order, and his own contemporaneous pronouncements about what his executive order means. No separation of powers concerns are raised by the Court's holding the Executive to his own orders and regulations.

Not pleased with the practical effects of the new executive order, the government takes aim at FOIA itself. Two separate fallacies underlie petitioners' reinterpretation of FOIA, and the Court should firmly reject both of them. First, the 1974 Amendments to FOIA specifically empowered the courts to conduct a de novo review of the ultimate issue whether withheld documents were in fact properly classified pursuant to executive order. Petitioners' attempt to transform Congress' action in 1974 and the words "de novo" into a codification of deference to the Executive's classification

decisions turns the 1974 Amendments on their head. Second, FOIA does not present any separation of powers problem, let alone one that could justify a court reading the words "de novo" out of the statute pursuant to the doctrine of constitutional doubt. A federal court's authority to require the Executive to abide by his own prospective regulations is at least as old as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), itself.

I. The Plain Language of the Statute, the Decisions of this Court, and the Legislative History of FOIA All Require De Novo Judicial Determination of Whether Classification Is Proper Pursuant to the Executive Order.

A. The Plain Language of the Statute Precludes an "Utmost Deference" Standard.

Petitioners' claim that a reviewing court must pay "utmost deference" to an agency classification decision is founded on an Orwellian revision of the history surrounding the 1974 Amendments to FOIA. Pet'r Br. 43-50. Petitioners' assertion that Congress, in overriding President Ford's veto, actually meant to adopt and codify his objections to the legislation is ludicrous on its face. *Id.* Equally implausible is petitioners' argument that in requiring that matters be "specifically authorized" to be classified under an executive order and be "in fact properly classified," 5 U.S.C. § 552(b)(1), and further mandating that "the court shall determine the matter *de novo*," 5 U.S.C. § 552(a)(4)(B), Congress meant to signal its desire that courts "should defer to the Executive Branch unless its identification of harm to the national security is implausible." Pet'r Br. 12. Even petitioners' historical revisionism cannot transform statutory amendments specifically designed to overrule *EPA v. Mink* into its inadvertent codification.

In *Mink*, this Court effectively eliminated any judicial role under FOIA Exemption 1. *Mink* involved a request by numerous Members of Congress for pre-decisional memoranda provided to the President regarding plans for future

underground nuclear weapons testing. At the time, Exemption 1 shielded from disclosure matters "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1967). The Court rejected "any possible argument that Congress intended [FOIA] to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them." *Mink*, 410 U.S. at 85. Rather, proof of the fact of classification under the executive order satisfied the government's burden under Exemption 1. *Id.* Given this limited scope of judicial inquiry, in camera review of contested documents was not authorized or needed under Exemption 1. *Id.*

Congress reacted swiftly. In 1974, Congress amended FOIA and specifically overruled this Court's decision in *Mink*. Pub. L. No. 93-502 §§ 1-3, 88 Stat. 1561 (1974). As amended, Exemption 1 allows the government to withhold only those materials that are "(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (emphasis on material added by 1974 Amendments). Congress also amended the judicial review section as follows: "In such a case the court shall determine the matter *de novo*, and may examine the contents of any such agency records in camera to determine whether any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (emphasis on material added by 1974 Amendments).

The plain language of these amendments, with no further exegesis, establishes that Congress overruled that portion of *Mink* that required courts to defer to the act of classification. The requirement that classification be "specifically authorized" by the order, the requirement that the order establish "criteria" governing classification, and the requirement that the withheld material be "in fact properly classified," leave no doubt that a federal court is obligated independently to interpret the executive order, apply its criteria, and determine if those criteria are applicable in the case before it. Likewise,

the requirements that the court "shall determine the matter *de novo*" and that the "burden is on the agency to sustain its action" leave no doubt that the court must determine the ultimate issue of proper classification for itself, without deferring to the withholding agency's own conclusion that the document is properly classified.¹⁰ This Court need examine no further to reject the government's position. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

¹⁰ The meaning of the words "de novo" has been fixed in this Court's decisions both before and after Congress chose them in 1966. See, e.g., *Choctaw Nation v. United States*, 119 U.S. 1, 30 (1886) (de novo review requires the court to consider the matter "from the beginning, and as if [the questions] were new and had freshly arisen"); *Irvine v. The Hesper*, 122 U.S. 256, 257 (1887) (de novo means "without any regard to what was done below"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) ("de novo" means that "the court should make an independent determination of the issues"). The Court has also made clear that "de novo" review is incompatible with deference to the initial decisionmaker. See, e.g., *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("[W]hen de novo review is compelled, no form of appellate deference is acceptable."); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-15 (1989) (contrasting de novo review with deferential standard generally applicable under the APA); *Chandler v. Roudebush*, 425 U.S. 840, 862 n.37 (1976) (same). Thus, petitioners' bold statement that "[t]he utmost deference standard comports with FOIA's provision for de novo district court review," Pet'r Br. 47 (citing 5 U.S.C. § 552(a)(4)(B)), contradicts more than a century of this Court's jurisprudence regarding standards of review. See also S. Childress & S. Davis, 2 *FEDERAL STANDARDS OF REVIEW* § 15.02 (6th ed. 1992) ("Under the standard called *de novo* review, the court is charged to affirm only if it agrees with the decision under review – that is, if it finds that the decision is the correct one. Where the court does not agree that the decision is the correct one, it is authorized to substitute its own judgment."); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Parallels and Paybacks of Legislating Democratic Values*, 33 *Emory L.J.* 649, 655 (1984) ("Most important, the court decides the issue afresh, without deference to the agency's call.").

Petitioners' contrary position is legally and linguistically untenable. They argue that the 1974 Amendments actually codified an "utmost deference standard," Pet'r Br. 47, for review of the agency withholding of documents, at least under Exemption 1. Under this standard, a court may only order disclosure "where it concludes that the Executive's explanation of the harm to the national security is implausible (even after giving it utmost deference) or contrary to the plain terms of the Executive Order. . . ." *Id.* The text of the statute simply cannot absorb this blow. Under petitioners' approach, Exemption 1's provision permitting classification only if "specifically authorized" by the executive order is transformed into a provision permitting classification "unless specifically prohibited" by the order. It also creates a presumption of non-disclosure contrary to FOIA's express commands. It renders the words "determine the matter *de novo*" utterly meaningless by adopting a standard of review more lenient than even the arbitrary and capricious standard typically applied to agency action under the Administrative Procedure Act ("APA").¹¹ Finally, Congress' express authorization of in camera review is rendered well nigh meaningless where the court must give "utmost deference" to the decision to withhold and may reject only explanations that are "implausible" on their face. It is hard to see when in camera review would ever be appropriate under such a regime.

Not surprisingly, petitioners' position conflicts with other provisions of FOIA. In the same 1974 Amendments that produced the present language of Exemption 1, Congress provided that if a court ordered disclosure and assessed attorneys fees against the government "and the court additionally issues a written finding that the circumstances surrounding

¹¹ Compare 5 U.S.C. § 706(2)(A) (agency action generally reviewed to assure that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Congress codified this general standard of judicial review of agency action two months after it first adopted a de novo standard for FOIA cases. See Pub. L. No. 89-487, § 3(c), 80 Stat. 250, 251 (1966) (see also Pub. L. No. 89-554, § 706(2)(A), 80 Stat. 378, 393 (1966)).

the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding," an investigation and possible discipline of the individual employees involved should follow. Pub. L. No. 93-502, § (a)(4)(F), 88 Stat. 1561, 1562 (1974) (codified as amended at 5 U.S.C. § 552(a)(4)(F) (1974)) (emphasis added). This provision obviously reflects the fact that a significantly more stringent standard than "arbitrary and capricious" applies to judicial review of agency withholding. Employee discipline was reserved for a small set of cases where the withholding was completely unjustified or plainly implausible. Yet, petitioners would have this Court adopt a standard at least as relaxed as this one for the primary determination of whether a document should be released.

The approach advocated by petitioners thus violates "the cardinal principle of statutory construction." That a court must "give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). It renders the words "determine the matter de novo" meaningless, by ensuring that the court determines *nothing* de novo. It gives no effect to the requirement that the agency bear the burden of sustaining its action, by instead erecting a presumption that the agency's explanation is legally sufficient, which presumption is rebutted only by a showing that the proffered explanation is, in fact, implausible. These factors preclude adoption of the government's position.

Petitioners' interpretation also necessarily entails the proposition that the words "the court shall determine the matter de novo" take on a different meaning depending upon which of the nine exemptions listed in Section 552(b) is invoked. Exemption 1 is governed by the "utmost deference standard," petitioners say, because Congress intended review "to be narrow and appropriately deferential, consistent with the separation of powers and the President's responsibilities under the Constitution for the conduct of national defense and foreign affairs." Pet'r Br. 46. Petitioners do not identify the proper standard of review for the other eight exemptions. Presumably, at least some exemptions must be governed by a

true de novo standard of review, because the concerns that, according to petitioners, led Congress to "intend" (without enacting) a lesser standard for Exemption 1 are not present. Thus, true de novo review must apply, for example, to FOIA litigation regarding trade secrets under Exemption 4 or financial institution data under Exemption 8. See 5 U.S.C. §§ 552(b)(1)(4) & (8). Yet, by its plain terms, the judicial review section applies one standard to all FOIA litigation. See 5 U.S.C. § 552(a)(4)(B). Under the government's approach, de novo review blinks on and off like a broken neon sign, depending upon which exemption is invoked. See, e.g., *Bank-America Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause."). There is *no evidence* that Congress intended such a result and, contrary to petitioners' suggestion, the Constitution does not command it.

B. This Court's FOIA Decisions Require Rejection of the "Utmost Deference" Standard.

Nor can the statutory construction suggested by petitioners be squared with the decisions of this Court. In *Reporters Committee*, the Court explicitly recognized that Congress had chosen language in FOIA to *distinguish* it from the limited review function assigned to courts under other provisions of the APA: "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter *de novo*.'" 489 U.S. at 755 (footnote omitted).

In *Reporters Committee*, the Court dealt with Exemption 7(C), which authorizes withholding of law enforcement records or information whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The Court noted that the

amendments to FOIA had actually reduced the government's substantive burden of proof, by replacing the words "would constitute" with "could reasonably be expected to constitute." *Reporters Committee*, 489 U.S. at 756 n.9 (citations omitted). The Court specifically held that the relaxation of the substantive standard did not affect the scope of a district court's review. "[T]here is no indication that the shift was intended to eliminate *de novo* review in favor of agency deference in Exemption 7(C) cases." *Id.* (emphasis added). Rather, this Court made clear that "district courts still operate under the general *de novo* standard of review." *Id.* *Reporters Committee* precludes acceptance of petitioners' argument that an amendment intended to *increase* the government's substantive burden under Exemption 1 at the same time did away with "the general *de novo* standard of review."

This Court has also rejected attempts to erect presumptions applicable to specific exemptions, even where core executive functions, such as law enforcement, are involved. Thus, in *Department of Justice v. Landano*, 508 U.S. 165 (1993), the Court unanimously rejected the government's argument that all persons who give information to the Federal Bureau of Investigation should be presumed to be "confidential sources" within the meaning of FOIA Exemption 7(D). The Court noted that such a presumption would be "rebuttable in theory" but "all but irrebuttable" in practice, because the government would have exclusive access to the actual facts. *Id.* at 176. The Court found the proposed presumption inconsistent with FOIA itself, in words directly applicable to this case:

A prophylactic rule protecting the identities of all FBI criminal investigative sources undoubtedly would serve the government's objectives and would be simple for the Bureau and the courts to administer. But we are not free to engraft that policy choice onto the statute that Congress passed. For the reasons we have discussed, and consistent with our obligation to construe FOIA exemptions narrowly in favor of disclosure (citations omitted), we hold

that the government is not entitled to a presumption that a source is confidential.

Id. at 180-81. The presumption that a document is properly classified, proposed by the government here, is equally un rebuttable in practice and equally contrary to the text and purpose of FOIA. *Reporters Committee* and *Landano* require rejection of the "utmost deference" standard for Exemption 1 cases.

Unable to find any FOIA case that supports the replacement of the "de novo" standard with the newly minted "utmost deference" standard, petitioners cite *United States v. Haggard Apparel Co.*, 119 S. Ct. 1392, 1399 (1999), for the proposition that deference akin to that recognized in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is consistent with a statutory provision requiring *de novo* review. Pet'r Br. 47 & n.44. The citation is extremely misleading. The provision at issue in *Haggard Apparel*, 28 U.S.C. § 2643(b), nowhere uses the words "de novo" and, unlike FOIA, does not place the burden of proof on the government to justify its actions. In *Haggard Apparel*, this Court explicitly distinguished a case like this one, where Congress has specifically chosen *not* to require deference to agency determinations of law: "[I]f . . . Congress had specified that in all suits involving interpretation or application of [a statute] the courts were to give no deference to the agency's views, but were to determine the issue *de novo*," *Chevron* deference would be inappropriate." 119 S. Ct. at 1399 (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16). FOIA is the archetypal example of a statute in which Congress chose not to require deference to the Executive's view of the law.

C. The Legislative History of the 1974 Amendments Directly and Definitively Contradicts the Notion that Congress Adopted President Ford's View of the Legislation While Overriding His Veto.

The legislative history of the 1974 Amendments completely contradicts petitioners' position that Congress meant to codify an "utmost deference" standard despite the language it chose. That history makes clear that Congress intended to overrule both *Mink's* deference to Executive classification decisions and its related rejection of *in camera* review under Exemption 1. In fact, Congress expressly rejected a statutory rule of deference specific to Executive decisions under Exemption 1 during the debates on the 1974 Amendments.

The 1974 changes to Exemption 1 had their roots in the House in H.R. 12471, a compromise bill that was unanimously reported from the House Government Operations Committee on February 21, 1974. See H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6267 (1974). Section 2 of H.R. 12471 would have amended Exemption 1 to sanction the withholding of matters "authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy." The Committee Report described this change as follows:

The change from the language pertaining to information "required" to be classified by executive order to information which is "authorized" to be classified under the "criteria" of an executive order means that the court, if it chooses to undertake review of a classification determination, including examination of the records *in camera*, may look at the reasonableness or propriety of the determination to classify the records under the terms of the executive order.

H.R. Rep. No. 93-876, at 7. The Department of Justice opposed Section 2 of the bill, arguing that it "would, in effect, transfer the decision as to whether a document should be protected in the interests of foreign policy or national defense

from the Executive Branch to the courts." H.R. Rep. No. 93-876, at 19. The bill passed the House by a vote of 383 to 8. 120 Cong. Rec. 6804-20 (1974).

On October 8, 1973, Senator Kennedy introduced S. 2543, which became the Senate version of the 1974 Amendments. The Kennedy bill would have amended Exemption 1 to allow withholding of matters that were "specifically required by an executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute." S. 2543, 93d Cong. § 2 (1974). The accompanying report left no doubt as to the import of this amendment:

The addition of the words "and are in fact covered by such order or statute" to the present language of section 552(b)(1) will necessitate a court to inquire during *de novo* review not only into the superficial evidence – a "Secret" stamp on a document or set of records – but also into the inherent justification for the use of such a stamp.

S. Rep. No. 93-854, 93d Cong., 2d Sess. 30 (1974). Senator Kennedy characterized the amendment to Exemption 1 as follows: "In its only amendment of a substantive exemption in FOIA, S. 2543 makes clear the duty of a court reviewing withholding of classified material to determine whether a claim based on national defense or foreign policy is in fact justified under the statute or executive order. Thus the court will not take an official's word for the propriety of the classification, but will look to the substance of the information to see if it had been properly classified." 120 Cong. Rec. 17,014, 17,017 (1974) (statement of Sen. Kennedy).

As originally presented to the Senate from committee, S. 2543 would have altered the judicial review section of FOIA to erect a specific rule of deference for determinations under Exemption 1. That provision provided:

(ii) In determining whether a document is in fact specifically required by an executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document *in camera* if it is unable to

resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its *in camera* examination, the court may consider further argument, or an *ex parte* showing by the government, in explanation of the withholding. *If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.*

S. 2543, 93d Cong., 2d Sess. § 1 (1973) (emphasis added). During the Senate debates, Senator Muskie offered an amendment (No. 1356) to strike this provision, which was supported by the sponsor of the legislation, Senator Kennedy. Senator Muskie explained the need to strike this language as follows:

If this provision is allowed to stand, it will make the independent judicial evaluation meaningless. This provision would, in fact, shift the burden of proof away from the Government and go against the express language in section (a) of the Freedom of Information Act, which states that in court review "the burden of proof shall be on the Government to sustain its action." Under the Amendment I propose, the court could still, if it wishes, make note of an affidavit submitted by the head of an agency, just as the court could request or accept any data, explanatory information or assistance it deems relevant when making its determination. However, to give express statutory authority to such an affidavit goes far to reduce the judicial role to that of a mere concurrence in Executive decisionmaking.

120 Cong. Rec. 17,014, 17,023 (1974) (statement of Sen. Muskie). Senator Stennis of Mississippi opposed the Muskie

Amendment. He argued that S. 2543 erected only "a mild presumption in favor," *id.* at 17025, of the agency head's justification for withholding. Senator Roman Hruska argued that without the presumption the bill was unconstitutional, citing many of the cases relied upon by the government in this case. Senator Ervin supported the Muskie amendment, stating: "The bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong." *Id.* at 17,030. Senator Ervin thought judges should make the determination themselves rather than inquiring "whether or not the [Executive] reached the wrong decision in an unreasonable or reasonable manner." *Id.* In the end, the Muskie amendment was carried by a vote of 56 to 29, and a rule of "deference" applicable to Exemption 1 cases was stricken from the bill. As amended, the language of S. 2543 was substituted for the House bill, H.R. 12471, and was then passed by the Senate on May 30, 1974, by a vote of 64 to 17. 120 Cong. Rec. 17,014, 17,047 (1974).

A House-Senate Conference Committee, chaired by Representative Moorhead, met in August and September of 1974. On September 25, 1974, the Committee issued its report. H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. (1974). The Conference Report's proposed amendment to Exemption 1 contains exactly the language that became law. Of that language the Report states:

When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al.*, *supra*, with respect to *in camera* review of classified documents.

H.R. Conf. Rep. No. 93-1380, at 12 (1974).

The Report goes on to note that, given the Executive Branch's expertise in the area of national defense and foreign policy, courts should give "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" in making a *de novo* determination of whether classification is proper. *Id.* This reference makes clear that any deference is limited to affidavits containing factual matters in areas of Executive Branch expertise. It cannot be extended to interpretation of the executive order itself or the ultimate determination of whether classification is in fact proper. Such an extension would eviscerate both the 1974 Amendments to Exemption 1 and the *de novo* standard.¹²

Petitioners attempt to suggest that an exchange of letters between President Ford and Senator Kennedy and Representative Moorhead, during the Conference Committee, somehow "changed" the legislation that emerged. Pet'r Br. 44-45. Besides being contrary to the most rudimentary principles of bicameralism and presentment, this argument is also counterfactual. President Ford told Senator Kennedy in his letter: "I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security." Letter from President Gerald R. Ford to Senator Edward Kennedy (Aug. 20, 1974), *reprinted in* House

¹² Thus, cases like *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980), and *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984), are simply inapposite. See Pet'r Br. 47 & n.42. Respondent does not question the proposition that the Executive's affidavits containing factual representations about harm to the national security are entitled to deference from a federal court. Indeed, to the extent of Executive expertise, deference to statements under oath regarding probable harms under any exemption would be entitled to deference. The Ninth Circuit did not question the representations regarding potential harms from disclosure contained in the government affidavits filed in this case. Rather, it correctly held that those harms, standing alone, do not justify nondisclosure under the new Clinton Order. See *infra* pp. 36-48.

Comm. on Gov't Operations Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 Source Book*, 94th Cong., 1st Sess. 367, 369 (1975). As we know, such a provision was never included in the final legislation. Moreover, petitioners cannot reconcile their position that the Conference Committee (without changing a word of the legislation) satisfied President Ford's concerns with the fact that President Ford vetoed the legislation *precisely because* of his concerns about *de novo* judicial review of classification decisions under Exemption 1. See Pet'r Br. 45 (quoting H.R. Doc. No. 383, 93d Cong., 2d Sess. III (1974)). In his veto message, the President specifically noted his concern that the legislation he was vetoing "give[s] less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is *accorded determinations involving routine regulatory matters*." President's Message to the House of Representatives Returning H.R. 12471 Without His Approval, 10 Weekly Comp. Pres. Doc. 1318 (Oct. 17, 1974) (emphasis added). President Ford renewed his proposal for express statutory deference:

I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In considering the reasonableness of the classification, the courts would consider all the attendant evidence prior to resorting to an *in camera* examination of the document.

Id.

Congress did not accept President Ford's proposal, and his veto was overridden without any change to the legislation. Statements made in both Houses during the debate on the President's veto leave no doubt that Congress expressly rejected both President Ford's analogy to review of agency action and his proposed "reasonable basis" test. As Representative Erlenborn put it:

The President asks that the classification be supported, and the court not have authority to overturn it if there is any reasonable basis to support the classification. He uses as argument a corollary of the decisions coming from regulatory agencies. *I do not believe that the corollary is apt. The decisions of regulatory agencies are reached ordinarily as a result of adversary proceedings, public proceedings, and the making of a record.*

120 Cong. Rec. 36,622, 36,627 (1974) (emphasis added). See *id.* at 36,629 (statement of Rep. Aspin) ("Why should the courts presume that an administrative classification is reasonable?").¹³

Similar statements were made during the debate on the veto in the Senate. Senator Kennedy, the Senate sponsor of the legislation, defended the de novo review provisions against President Ford's criticisms:

¹³ Petitioners attempt to bolster their position with carefully elided quotations from Representative Moorhead's remarks in the veto debate. Pet'r Br. 46. Representative Moorhead used the phrase "an obviously dangerous provision" in discussing a portion of the President's veto message suggesting that no deference *at all* would be paid to the representations of the Secretary of State versus those of a FOIA plaintiff. See 120 Cong. Rec. at 36,623. Moreover, Representative Moorhead did not, as the government disingenuously implies, endorse the "reasonable basis" test proposed in President Ford's veto message by stating that is "exactly the way" review would occur under the legislation. Representative Moorhead was in fact addressing the procedural point of whether the court must first exhaust all other possibilities before turning to in camera review. On this point, President Ford and the Congress agreed. Representative Moorhead's full statement is as follows: "Mr. Speaker, in the procedural handling of such cases under the Freedom of Information Act, this is exactly how the courts would handle their proceedings." *Id.* (emphasis added). Later in the same statement, Representative Moorhead confirmed that after all sources of information had been tapped, including in camera review, the court must "determine if the classification marking was properly authorized." *Id.*

The President writes the classification rules in his Executive order. If those rules are inadequate to protect important information vital to our national defense, then let the President change the rules. But make the Government abide by them. Judicial review means executive accountability. *Judicial review will be effective only if a Federal judge is authorized to review classification decisions objectively, without any presumption in favor of secrecy.* That is what our systems of checks and balances is all about.

120 Cong. Rec. 36,865, 36,866 (1974) (emphasis added). Other Senators echoed this point during the debate. See, e.g., *id.* at 36,870 (statement of Sen. Muskie) ("And most importantly, the legislation will establish a mechanism for checking abuses by providing for review of classification by an impartial outside party."). At the same time, the President's allies spoke in support of his veto, and criticized the provision for de novo review of classification decisions. *Id.* at 36,873 (statement of Sen. Hruska) ("The courts review agency decisions to determine whether they are reasonably based or whether they are arbitrary or capricious. *This enrolled bill would establish a different type of review, however. It would empower a court to substitute its own decision for that of the agency.*") (emphasis added).

These statements by key players in the legislative process, on both sides of the veto debate, are flatly inconsistent with the facially counterintuitive proposition that Congress somehow adopted President Ford's view of the legislation in response to his veto.¹⁴ On November 20, 1994, the House

¹⁴ Petitioners' contention that Congress somehow acquiesced in President Ford's view of the legislation is further contradicted by the fact that, two days after the President's veto, Republicans offered a competing bill consistent with the President's wishes regarding Exemption 1 in an attempt to forestall an override vote. This bill, S. 4172, offered by the Senate Minority Leader, Hugh Scott, contained the express statutory

overrode the President's veto by a vote of 371 to 31. 120 Cong. Rec. 36,622, 36,633 (1974). The next day, the Senate followed suit by a vote of 65 to 27, and the 1974 Amendments became law. 120 Cong. Rec. 36,865, 36,882 (1974).

What emerges from the legislative history is a clear picture of rejection of any deference to the Executive's interpretation of the executive order. The model of *Chevron* judicial deference to agency decisionmaking was expressly discussed and rejected. A rule of "reasonable basis" deference unique to Exemption 1 was struck from the legislation after heated debate. The President vetoed the legislation because it did not accord any deference to the agency's classification decision and specifically proposed a statutory amendment. Key sponsors of the legislation argued for overriding the President's veto to preserve independent judicial review of classification decisions. Key opponents of the legislation argued that independent judicial review of classification decisions was unwise and violated separation of powers. The supporters of independent judicial review won, and President Ford's veto was overridden.

While the legislative history is consistent with according substantial weight to agency affidavits containing *factual* representations about matters of foreign affairs or national security within the Executive's unique expertise, it makes clear that the ultimate question of compliance with the executive order is for the court alone, without any deference to the executive's decision to classify. Thus, the kind of deference recognized by this Court in *Chevron*, 467 U.S. 837, is exactly what President Ford wanted to write into the legislation and what the Muskie amendment and the congressional override

deference provisions requested by President Ford in his veto message. See H.R. 4172, 93d Cong., 2d Sess. § 2(a) (1974) (specifically amending Exemption 1 to adopt a "reasonable basis to support the classification" test unique to that exemption). The bill did not attract substantial support, even among Republicans, and the House and Senate overrode the President's veto without any changes in the legislation.

of President Ford's veto flatly rejected. Petitioners are asking nothing less of this Court than to reverse the results of the Muskie amendment debate and the veto override debate and write President Ford's proposed amendment into the legislation.

D. The Doctrine of "Constitutional Doubt" Is Not Relevant to this Case.

Nor should this Court employ the doctrine of "constitutional doubt" to rewrite the provisions of FOIA that require *de novo* review and that place the burden on the government to sustain the withholding of information. See Pet'r Br. 47-48 & n.46 (citing *Public Citizen v. Department of Justice*, 481 U.S. 440, 466 (1989)). The thrust of the government's argument is that some form of deference, similar to *Chevron* deference, is constitutionally compelled in Exemption 1 litigation.

First, as we have demonstrated above, the language of FOIA is unambiguous and the intent of Congress is clear. Congress specifically intended to depart from the normal rules of deference to agency action and chose language to make its intention clear. The doctrine of "constitutional doubt" or "constitutional avoidance" only applies "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided." *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Where statutory text is plain, as here, the doctrine is inapplicable. See *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).

Second, even if the text and history of FOIA admitted of petitioners' construction, there is no serious constitutional question to avoid in this case. In *EPA v. Mink*, 410 U.S. at 83, this Court suggested that Congress could, in fact, promulgate its own standards for classification of national security information. But Congress delegated to the Executive *absolute* and

unreviewable discretion under Exemption 1 to establish classification criteria for national security information. As even the government concedes, "Congress did not attempt to restrict Executive Branch classification judgments to Congress' vision of harm to the national security or standards articulated in FOIA itself. Rather, the exemption specifically accedes to the President's own formula for classifying national security information." Pet'r Br. 29. The President, accordingly, was free to preserve the Reagan Order's presumption of national security harm from the disclosure of diplomatic communications, and he is free now to restore it. He is also free to establish a standard calling for classification of diplomatic communications whenever the foreign government, upon inquiry, requests it. In short, the President can do whatever he wants, but he must abide by whatever he does. It is hard to see how such a rule encroaches upon his constitutional prerogatives.

If Congress can require the Executive to promulgate prospective standards in this area, it can certainly assign the federal courts the quintessentially judicial task of interpreting those rules and applying them in particular cases. While deference to factual details in areas that are within Executive Branch expertise is contemplated and appropriate under FOIA, it is clear that Congress wished to assign to the courts the traditional judicial task of interpreting the law and applying it in particular cases. There is simply no support in this Court's separation of powers jurisprudence for the proposition that a form of *Chevron* deference is constitutionally compelled in these circumstances. If review itself is constitutional, which we understand the government to concede, the Constitution cannot dictate deference to the Executive's legal judgments.

Even absent an express statutory command such as contained in FOIA, this Court has consistently held that the Executive must follow his own regulations, even in areas where his authority is plenary. In *Service v. Dulles*, 354 U.S. 363 (1957), this Court unanimously held that the Secretary of

State must follow his own regulations in removing a foreign service officer for alleged acts of disloyalty, despite statutory language granting the Secretary removal power "in his absolute discretion." *Id.* at 370 (citing Pub. L. No. 82-188, § 103, 60 Stat. 458 (1947)). The Court held that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature." *Id.* at 372. Accord *United States v. Nixon*, 418 U.S. 683, 696 (1974).

Thus, FOIA's provisions allowing the courts to independently interpret and enforce the provisions of the Executive's own order do not raise any separation of powers concerns. Congress has simply commanded the Court to "say what the law is," without deferring to the viewpoint of the Executive Branch.

E. The 1996 Amendments to FOIA Did Not Alter or Repeal the De Novo Standard by Implication.

In a last ditch effort to avoid FOIA's plain language and the clear history of the 1974 Amendments, the government argues that the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996), altered⁴ the standard of review applicable to Exemption 1 cases. Since nothing in Exemption 1 was altered, and neither the de novo standard nor the burden of proof provisions were explicitly removed, this argument is one of repeal by implication. Such arguments "are not favored," *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936), and "[t]he intention of the legislature to repeal 'must be clear and manifest.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

The purpose of the 1996 Amendments was to impose new duties upon government agencies to search and provide records that they maintain in electronic format. In light of

these new disclosure duties, Section 6 of the 1996 Amendments added the following language to the judicial review section: "In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)." Pub. L. No. 104-231, § 6, 110 Stat. 3048, 3050 (1996). This provision cannot be read to override the de novo standard of review or the burden of proof provision of the same section. It simply calls for deference to factual assertions contained in government affidavits in areas of Executive Branch expertise. The House Report accompanying the 1996 legislation makes absolutely clear that no change to the de novo standard of review was intended. Of the changes to the judicial review provisions, it states:

This section does not affect the extent of judicial deference that a court may or may not extend to an agency on any other matter. There is no intent with this provision, either expressly or by implication, to affect the deference or weight which a court may extend to an agency determination or an agency affidavit on any other matter. The provision applies narrowly to agency determinations with regard to technical feasibility.

H.R. Rep. No. 104-795, 104th Cong., 2d Sess. 22 (1996).

II. The Background, Text, and Structure of the Clinton Executive Order Leave No Doubt that Frustration of a Foreign Government's Expectation of Confidentiality Is Insufficient To Justify Classification.

A. The Clinton Order Does Not "Specifically Authorize" Classification Based Solely on a Foreign Government's Expectation of Confidentiality.

As the foregoing discussion makes clear, the burden rests upon the agency to sustain its action, "which of course includes establishing the availability of an exemption from

disclosure." *Shaw v. FBI*, 749 F.2d 58, 61 (D.C. Cir. 1984) (Scalia, J.) (citation omitted). The government must demonstrate – unaided by presumptions or *Chevron* deference – that the harm it has identified falls within the plain terms of the executive order, such that the withheld letter "is in fact properly classified pursuant" thereto. 5 U.S.C. § 552(b)(1)(B).¹⁵

The plain language of the Clinton Order, however, makes clear that the breach of the foreign government's expectation of confidentiality is not sufficient, standing alone, to justify classification.

¹⁵ Contrary to petitioners' contention, Pet'r Br. 31, the Court's decision in *Udall v. Tallman*, 380 U.S. 1, 4 (1965), is inapposite as that case merely involved standard deference to an agency's "consistent[]" interpretation in the absence of any indication that Congress foreclosed such deference. As noted above, *Chevron* deference is not appropriate because it is inconsistent with FOIA's command that the government bear the burden of proving that classification is "specifically authorized" under a de novo standard of review. Thus, FOIA is not a statute in which Congress intended the courts to defer to executive determinations. *Cf. Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996) (doctrine of *Chevron* deference explained as an effort to give effect to congressional intent). Moreover, even if *Chevron* deference were applicable, petitioners' interpretation of the Clinton Order is inconsistent with its plain language and inconsistent with the President's statements made at the time of its promulgation. *See* note 21, *infra*. The President's contemporaneous interpretation of his own order is certainly entitled to greater weight than petitioners' contrary interpretation adopted for purposes of this litigation. *See Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 777 (1999) (Department of Commerce not entitled to *Chevron* deference in light of prior statements inconsistent with litigation position). Petitioners also contend that their interpretation has a lineage predating this litigation, noting that their interpretation was "first manifested when the FOIA request was denied." Pet'r Reply Br. to Opp. Cert. Br. at 7 n.6. But the denial letter was authored after, and in response to, the filing of respondent's FOIA litigation, and its single conclusory paragraph contains no legal interpretation of the Clinton Order. *See J.A.* 42-43.

In all their myriad briefs and affidavits in this case, petitioners have never denied that the actual *information* at issue here – that is, the actual *content* of the Home Office letter – is harmless. Petitioners have never claimed that public disclosure of the letter would harm the national security because of the sensitivity, value, and utility of its contents.¹⁶ Rather, petitioners argue only that the national security is inevitably harmed by “the act of disclosing any confidential communication from a foreign government,” even if the content of the communication is wholly innocuous. Pet’r Br. 28. According to the State Department declarations filed in this case, disclosure of any portion of the letter, regardless of content,¹⁷ would violate the British government’s expectation

¹⁶ For example, information relating to covert intelligence operations, nuclear weapons designs, war plans, and the like are obviously types of information whose sensitivity, value, and utility are such that disclosure would harm the national security. Indeed, some information is so sensitive or valuable that its very *existence* must be classified to prevent harm to the national security. FOIA itself recognizes this point with respect to Federal Bureau of Investigation records “pertaining to foreign intelligence or counter-intelligence, or international terrorism.” See 5 U.S.C. § 552(c)(3). Petitioners similarly note that the disclosure of the existence of confidential intergovernmental settlement efforts derailed the United States’ attempt to avert the Mexican War. Pet’r Br. 41 & n.38. Obviously, the type of harm that flows from the disclosure of the very existence of extremely sensitive information is not at issue in this case. Here, the date, sender, addressee, and general subject matter of the Home Office letter are in the public domain. The fact that the United States and Britain communicated over this extradition and that the British government expressed concerns about the fair treatment of its citizens in future criminal proceedings, are fully public.

¹⁷ Petitioners make the extra-record and unsupported assertion that the State Department was advised by the Labor Party government that it, like the Conservative Party government before it, “considered disclosure of the letter at issue in this case to be ‘out of the question.’” Pet’r Br. 10 n.6. Respondent is bound to point out to the Court that it was an official of the British government who first brought the existence and subject matter of the Home Secretary’s letter to the attention of respondent. See Letter of

of confidentiality and therefore “reasonably could be expected to damage the United States’ foreign relations with Great Britain and other nations by impairing the United States’ ability to engage in and obtain confidential diplomatic communications and by impeding international law enforcement cooperation.” Pet’r Br. 14. As the Ninth Circuit correctly held, this “breach of confidentiality” harm, standing alone, is simply not a sufficient justification for classification under the Clinton Order.

Section 1.2(a) of the Clinton Order provides: “Information may be originally classified *under the terms of this order only if all of the following conditions are met.*” Clinton Order § 1.2(a) (Pet. App. at 68a) (emphasis added). One of the conditions is that the information must fall into one of seven categories of information eligible for classification. Clinton Order § 1.5(a)-(g) (Pet. App. at 71a). “Foreign government information” is one of the seven categories of information that may be “considered for classification.” Clinton Order § 1.5(b) (Pet. App. at 71a). The Clinton Order, like the Reagan Order that it superceded, specifically restricts the category of “foreign government information” to diplomatic communications that are exchanged with an expectation of confidentiality. “Foreign government information” is defined under the Clinton Order, in relevant part, as “information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, *with the expectation that the information, the source of the information, or both, are to*

November 16, 1994 from H.M. Consul Stephen Turner, Seattle, Washington to Mr. Leslie Weatherhead. In that official communication, Consul Turner told respondent that the letter at issue in this case, “stressed the Home Secretary’s concern that questions of local prejudice were examined most carefully during the pretrial process.” Thus, the British government did not view the disclosure of at least a portion of the Home Secretary’s letter as “out of the question.” We have lodged a copy of Consul Turner’s letter to respondent with the Clerk of this Court. See *Morse v. Republican Party of Virginia*, 517 U.S. 186, 200 n.18 (1996).

be held in confidence." Clinton Order § 1.1(d) (Pet. App. 66a) (emphasis added).¹⁸

Under the Reagan Order, demonstrating that information fell into this category was alone sufficient to exempt it from disclosure. Any release of "Foreign government information" was "*presumed to cause damage to the national security.*" Reagan Order § 1.3(b)(c); Opp. Cert. App. 7a (emphasis added). In other words, under the Reagan Order a breach of a foreign government's expectation of confidentiality was deemed sufficient, in and of itself, to cause damage to the national security and thus to warrant classification of *all* foreign government information, regardless of its contents.

The Clinton Order, however, eliminates this presumption and explicitly requires a further, document-specific inquiry. Once the classifying authority has determined that the information is *eligible* for classification as "Foreign government information," the classifying authority also must "determine [] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." Clinton Order § 1.2(4) (Pet. App. 68a). The plain language of the Clinton Order leaves no doubt that the specific information itself – the contents of the document – must be assessed in terms of its potential to harm the national

¹⁸ The Clinton Order further defines "foreign government information" as:

(2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international association of governments, or any element thereof, *requiring that the information, the arrangement, or both, are to be held in confidence*; or (3) information received and treated as Foreign Government Information under the terms of a predecessor order.

Under the Reagan Order "Foreign government information" was, by definition, exchanged in confidence. Reagan Order § 6.1(d) (Opp. Cert. App. 24a). Thus, under the Clinton Order all "Foreign government information" is ipso facto exchanged in confidence.

security. Thus, the Clinton Order specifically defines "[d]amage to the national security" as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, *to include the sensitivity, value and utility of that information.*" Clinton Order § 1.1(l) (emphasis added) (Pet. App. 67a-68a).¹⁹ Indeed, the President himself confirmed this reading of his executive order in his signing statement. Opp. Cert. App. 26a-28a.²⁰ Noting that the purpose of "reforming the Government's system of secrecy" was to "greatly reduce the amount of information that we classify," *id.* 26a, 28a, President Clinton singled out the Reagan Order's categorical presumption of harm as one of the "excesses of the current system." *Id.* Emphasizing that "[c]lassifiers will have to justify what they classify," the President made clear that "we will no longer presumptively classify certain categories of information, whether or not the *specific information* otherwise meets the strict standards for classification." *Id.* 27a (emphases added).

Thus, the Clinton Order requires that the disclosure of "specific information" at issue present a threat to the national security to justify its classification. The order does not allow either general canons of diplomatic confidentiality or a specific foreign government request for confidentiality, standing

¹⁹ "Information" is itself defined as "any *knowledge* that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government." Clinton Order § 1.1(b) (Pet. App. 65a-66a) (emphasis added).

²⁰ As a statement of intent and purpose by the unitary and exclusive author of the Clinton Order itself, the President's signing statement is entitled to significantly more interpretive weight in this context than in the context of legislation. At a minimum, it should be accorded the same weight as a preamble to legislation. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1995); *Price v. Forrest*, 173 U.S. 410, 427 (1899). In addition to the signing statement, the preamble to the Clinton Order speaks in the same terms of increased access and more stringent criteria for classification. Pet. App. 26a-28a.

alone, to justify classification.²¹ The Clinton Order expressly eliminated a presumption that harm to the national security flows from a breach of diplomatic confidentiality. The inter-governmental exchange of information in confidence, therefore, is now only a *necessary* condition for classification, but is no longer a *sufficient* condition for classification. As the Ninth Circuit correctly noted, under petitioners' reading of the executive order, any "foreign government information," regardless of its content, may be classified, for disclosure of any such information will cause, by definition, "breach of confidentiality" harm. The State Department declarations filed in this case, therefore, could be recycled to justify withholding any diplomatic communication in any case. Recitation of general canons of diplomatic confidentiality in State Department affidavits is simply a back-door way of resurrecting the Reagan Order's presumption and, by the same token, of effectively eliminating the Clinton Order's document-specific requirement that the classifying authority "identify or describe the damage" that disclosure of the specific information would cause.

Petitioners' initial response to this analysis focuses on the language of the provision of the Clinton Order defining "[d]amage to the national security" as harm "from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." Clinton Order § 1.1(l) (Pet. App. 67a, 68a). Apparently recognizing that the terms "sensitivity, value, and utility" all relate to the content of the information, petitioners seize on the word

²¹ The British government's refusal to concur in the State Department's decision to disclose the Home Office letter simply reaffirmed that the letter, like "all correspondence between Governments," was sent with an expectation of confidentiality. Opp. Cert. App. 30a. If the British government had instead concurred with the State Department and had authorized disclosure of the letter, the document would no longer be clothed with an expectation of confidentiality and thus would no longer qualify as "foreign government information" eligible for classification and withholding under Exemption 1.

"'includ[es].'" arguing that the term "'connotes simply an illustrative application of the general principle,'" and thus does not exclude types of harm that are unrelated to the actual content of the information disclosed. Pet'r Br. 30 (quoting *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). But the word "includes" does not appear in Section 1.1(l) of the Clinton Order. And the formulation that does appear in the provision – "to include the sensitivity, value, and utility of that information" – is *prescriptive*, not illustrative; that is, the text of the provision plainly prescribes that any assessment of national security harm from the unauthorized disclosure of information is "to include the sensitivity, value, and utility of that information."²² Thus, contrary to petitioners' claim, the plain language of the Clinton Order requires consideration of the content of the information at issue in determining its potential to damage the national security.

Petitioners also look to the Clinton Order's provisions for declassification of documents to somehow expand the criteria for initial classification. Pet'r Br. 31 & n.27 (citing Clinton Order § 1.6(d) (Pet. App. 72a). The argument is completely circular. That provision provides that classifiers may exempt from automatic declassification after 10 years "*specific information*, the unauthorized disclosure of which could reasonably be expected to cause *damage to the national security* for a period of greater than [10 years]." Thus, the standards for initial classification must be met under the definitions of "information" and "harm to the national security" in the classification sections of the executive order. That release of

²² While "sensitivity, value, and utility," are not exclusive, they nonetheless must be read in the context of the doctrine of *ejusdem generis*. See, e.g., *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84 (1990); *Cleveland v. United States*, 329 U.S. 14, 18 (1946). All three of these listed "sources" of harm relate exclusively to the content of the information. Moreover, "sensitivity" cannot be wrested from its context and pressed into service as a new textual home for the Reagan Order's presumption of harm. See Pet'r Br. 30.

some *properly* classified material may be delayed where it would "damage relations between the United States and a foreign government," Clinton Order § 1.6(6), cannot serve to amend the definitions of "information" and "damage to the national security" contained in Sections 1.1(b) & (l) of the Clinton Order. The Clinton Order quite simply contemplates that it is no longer proper for the Executive to classify every piece of information whose release would upset a foreign government.

Petitioners argue that it is "inconceivable" that the Clinton Order's elimination of the presumption of harm was "intended to mandate a wholesale abrogation of the long-standing practice of diplomatic confidentiality." Pet'r Br. 33. But neither the court of appeals below nor we have advanced such a sweeping claim. Rather, we have simply taken the President at his word. Presumptive classification of certain categories of information was eliminated, according to the President himself, because it is indifferent to "whether or not the *specific information* otherwise meets the strict standards for classification." Opp. Cert. App. 27a (emphasis added). Confidentiality *for its own sake* is simply an insufficient basis for classification under the Clinton Order. If the "specific information" at issue does not itself pose an articulable threat to the national security – if it is "innocuous" – it cannot be classified under the Clinton Order, although it is clothed in an expectation of confidentiality.

Thus, while it is true that the Clinton Order's elimination of the presumption of harm (as one of the "excesses of the current system") was not intended to mandate a wholesale abrogation of *all* expectations of diplomatic confidentiality, the plain fact is that it surely was intended to abrogate *some* such expectations in the name of open government. The whole purpose of the Clinton Order's "reforms," after all, was to "greatly reduce the amount of information that [the agencies]

classify in the first place and the amount that remains classified." Opp. Cert. App. 28a.²³

Under petitioners' understanding of the Clinton Order, elimination of the presumption of harm literally changed nothing. Petitioners concede that eliminating the presumption of harm had the effect of requiring that a reasonable official make "an actual judgment" on whether "the confidentiality of diplomatic discourse should be invoked with respect to *each document*." Pet'r Br. 33-34 (emphasis added). But they reject any "content-based analysis" of each document as "unworkable in practice." *Id.* 34. Because such an analysis can be conducted only after the confidential communication has been sent, they argue, it "would fail to furnish an assurance of confidentiality [to the sender] *in advance*, which often is essential to candid communications." *Id.* (emphasis in original).

Petitioners' patently contrived understanding of the Clinton Order renders its "reforms" not only meaningless, but absurd. First, an interpretation of the Clinton Order rejecting any "content-based analysis" of foreign government information simply ignores the order's plain language requiring that an assessment of the information's potential for harm is "to include the sensitivity, value, and utility of that information" – all of which are content-based inquiries. Moreover, if a responsible officer is to make an "actual judgment . . . about each document," but is not to analyze the content of the

²³ Under the government's view of the Clinton Order, a foreign government's preference for confidentiality, no matter how irrational or idiosyncratic, can, standing alone, justify classification. This position has no support in the text of the order itself or the President's statements in conjunction with its promulgation. Moreover, such a position reduces government openness in the United States to the least common denominator of all the countries in the world with which the United States has any diplomatic communication. This position cannot be reconciled with the "greater opportunity to emphasize our commitment to open Government" announced in the preamble of the Clinton Order. Pet. App. 65a.

document, then on what is his judgment to be based? Petitioners' prescription for a standardless, ad hoc, content-blind review of each document violates the central command of FOIA's Exemption 1 – that judgments to withhold information be "specifically authorized under criteria established by an Executive order." 5 U.S.C. § 552(b)(1)(A). And if the purpose of the responsible official's document-specific judgment is to determine whether the confidentiality of the document should be maintained, then the official is presumably authorized to determine that the document's confidentiality should not be maintained. But such a judgment, like a content-based analysis of the document, would have to be made after the document is sent and therefore would fail, also like a content-based analysis, "to furnish and assurance of confidentiality *in advance*." Pet'r Br. 34 (emphasis on original). Thus, petitioners' objection to review of each document based upon its content is no less applicable to petitioners' alternative regime requiring an actual judgment about each document based upon unknown, unstated criteria.²⁴

Finally, petitioners assert that the elimination of the Reagan Order's presumption of harm "contemplated only that, in some cases – such as routine scheduling information or congratulatory/condolence messages from certain governments, and perhaps, on occasion, more substantive matters – the established norm of confidentiality in diplomatic relations might never attach, could be outweighed by other considerations, or could be waived." Pet'r Br. 34. But if a diplomatic

²⁴ Petitioners cite the Clinton Order's abrogation of the presumption applicable to "confidential foreign sources, or intelligence sources or intelligence methods" to raise the specter of wholesale release of these items. Pet'r Br. 33 n.32. This argument ignores the avenue left open to the government under the express terms of the Clinton Order: "identify and describe" the harm that would flow from disclosure of this "information." Petitioners also ignore the availability of withholding statutes under Exemption 3, which offer additional protections to confidential sources and intelligence methods. See, e.g., 50 U.S.C. § 403-3(c)(6) (intelligence sources and methods); *CIA v. Sims*, 471 U.S. 159 (1985).

communication is not made in confidence, either because an expectation of confidentiality never attached in the first place or because such an expectation was waived by the foreign government, the communication does not, by definition, qualify as "foreign government information" and cannot properly be classified as such under Exemption 1. And the presumption of harm did not have to be eliminated to ensure that the general norm of diplomatic confidentiality could be overcome in certain circumstances. Indeed, the Reagan Order's presumption of harm was not an inflexible straightjacket, demanding classification even of "information that does not require protection in the interest of national security." Reagan Order § 1.6(a) (Opp. Cert. App. 10a). We are also constrained to note that the disclosure of "routine scheduling information or congratulatory/condolence messages" would not seem to be what President Clinton had in mind in proclaiming that the new executive order would "bring the system for classifying . . . national security information into line with our vision of American democracy in the post-Cold War world." Opp. Cert. App. 26a.²⁵

At bottom, petitioners' position in this case is founded, we submit, on the government's conclusion that some of the "reforms" of the Clinton Order looked on paper better than they work in practice. We cannot deny that some of the policy and practical concerns voiced by petitioners have force. Perhaps the executive order should be amended, but that issue is not for this Court to decide. Petitioners should address their brief to the White House.

²⁵ See also Information Security Oversight Office, 1998 Report to the President (August 31, 1999) (Clinton Order "is a radical departure from the secrecy policies of the past. The first order to revise the security classification system since the end of the Cold War, E.O. 12958 includes major changes which should result in fewer new secrets and significantly more information being declassified.").

The "specific information" at issue in this case does not meet, in the President's words, "the strict criteria for classification" under his executive order. The withholding is based not on the content of the letter or any facts its disclosure would establish, but purely on the fact that it was sent, like all intergovernmental communications, with an expectation of confidentiality. This is confirmed by the fact that the United States was prepared to release the letter and did not classify it until the British requested that it not be disclosed. The Clinton Order simply does not allow a foreign government expectation of confidentiality, standing alone, to justify classification. Because the government has never "identified or described" any other harm that qualified as harm to the national security under the Clinton Order, the Ninth Circuit correctly concluded that the letter is not properly classified under the new executive order and must be released.²⁶

B. Portions of the Letter Are Already in the Public Domain and Cannot Be Classified Under Any Standard.

As noted above, a substantial amount of information about this two-page letter is already in the public domain. Its date, sender, addressee, and general subject matter are matters of public record. The British Consul in Seattle has formally disclosed to respondent that a portion of the letter expresses

²⁶ The government also suggests in passing that a lesser standard might somehow apply to information concerning the "foreign relations or foreign activities of the United States," under Section 1.5(d) of the Clinton Order. Pet'r Br. 34-35 n.33. It cannot be that a more general category of information, not confidential at the time of its exchange, is the subject of greater protection from disclosure under the Clinton Order. Such a rule would violate the well-settled canon of construction that the general cannot be read to trump the specific. See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). It also ignores the fact that the Clinton Order made structural changes applicable to *all categories* of classifiable information by requiring that damage to the national security be identified and described and adopting a specific definition of that damage.

the British government's concerns relating to "questions of local prejudice." See note 18, *supra*. Given its nature and timing, it is quite likely the letter also discusses the doctrine of dual criminality and the British refusal to extradite Hagan and Croft on the second count of the indictment against them. The government's own affidavits in this case confirm certain other contents of the letter. Thus, the Shields Declaration states:

The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

Pet. App. 54a.

Under FOIA, respondent is entitled to "[a]ny reasonably segregable portion of a record" after deletion of any exempt portions. 5 U.S.C. § 552(b). "In determining segregability, 'courts must construe the exemptions narrowly with the emphasis on disclosure.'" *Church of Scientology Int'l v. Department of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (citing *Wightman v. Bureau of Alcohol Tobacco & Firearms*, 755 F.2d 979, 983 (1st Cir. 1985)). Clearly portions of this document contain information of public record or details about a long since concluded criminal case, information that cannot possibly pose a national security threat under any standard. Thus, at a minimum, respondent is entitled to a remand for a proper segregability determination under any new interpretation of the Clinton Order adopted by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES J. COOPER*

ANDREW G. McBRIDE

DAVID H. THOMPSON

MARGARET A. RYAN

COOPER, CARVIN

& ROSENTHAL, PLLC

Suite 200

1500 K Street, N.W.

Washington, D.C. 20005

(202) 220-9600

**Counsel of Record*

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UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF JUSTICE; AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Supreme Court, U.S.

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REPLY BRIEF FOR THE PETITIONERS

On November 23, 1999, we moved this Court to vacate the judgment below and remand for dismissal based on mootness. In the event the Court does not determine that the case is moot, however, we submit this reply brief.

1. The Executive Order Protects Against The Harm To National Security That Arises From The Act Of Disclosing A Confidential Communication From A Foreign Government

Respondent “has no quarrel” (Resp. Br. 15) with the constitutional principles outlined in our opening brief (Gov’t Br. 15-16, 21-27) establishing that the Executive Branch—not Congress and not the courts—has the primary responsibility and authority for managing the Nation’s foreign relations. Nor does he contest that the ability to protect the secrecy of foreign government communications is integral to the exercise of that power. See *id.* at 17-27. Respondent, moreover, concedes (Br. 13) that the State Department’s declarations in this case showed that “the British government wished the letter [at issue] kept confidential,” and that the United States’ “important” relationship with Britain “might suffer if the letter [were] released despite British protest.” Instead, respondent argues only that the harm arising from breaching a foreign government’s expectation of confidentiality does not constitute “damage to the national security,” as defined in Executive Order No. 12,958, 3 C.F.R. 333 (1996). Respondent is wrong.

a. One scours respondent’s brief in vain for reference to any language in the Executive Order that forecloses consideration of the harm arising from breach of a foreign government’s trust—a harm that Presidents have recognized and protected since the dawn of the Republic (Gov’t Br. 17-20, 35-37). His argument finds no home in the Order’s definition of “[d]amage to the national security,” which

encompasses all "harm to the national defense or *foreign relations* of the United States *from the unauthorized disclosure of information*, to include the sensitivity, value, and utility of that information." Exec. Order No. 12,958, § 1.1(l) (emphasis added). That language plainly embraces the harm to "foreign relations" emanating from the very act of "unauthorized disclosure of information." The Order thus recognizes that there are circumstances when, for example, although the words in a particular letter might appear innocuous, a series of developments in the foreign affairs arena might leave the United States' relations with the authoring country in such a condition that any additional breach of trust could seriously undermine important diplomatic efforts and thus "harm" the Nation's "foreign relations."

The Executive Order, moreover, specifically provides in its declassification provisions that, if "the release" of classified information will "damage relations between the United States and a foreign government," the document falls within the extraordinary category of information that is exempt from the general ten-year rule for declassification. Exec. Order No. 12,958, § 1.6(d)(6); see also *id.* § 3.4(b)(6) (similar, for 25-year declassification rule). Those special exceptions confirm that the damage to diplomatic relations resulting from the act of releasing a document is an independent and highly relevant component of the "[d]amage to the national security" against which the Executive Order is intended to guard. Respondent's only answer to this argument is to suggest (Br. 43-44), without reasoned explanation, that the Order entirely disconnects the foreign relations harms that permit classification in the first instance from those that prohibit declassification. Yet the latter is simply a form of continued or renewed "classification." There is simply no basis for concluding that the Executive Order was intended to be solicitous of a foreign government's expectations of confidentiality concerning 25-year-old documents, but not with respect to communications sent last week.

b. Respondent attempts (Br. 38, 40-42) to avoid the Executive Order's clear import by equating the "information" that the Order protects from disclosure with the "content[s]" of a document. But that is wrong. The Executive Order defines the "[i]nformation" that it protects from disclosure as "any knowledge that can be communicated * * * regardless of its physical form or characteristics." Exec. Order No. 12,958, § 1.1(b). That language plainly embraces not just the internal contents of a document, but also "any knowledge" that disclosure of the document would reveal, such as the acknowledgment that a foreign government made a particular communication, that it communicated with the United States government at all, or that it chose to convey views or concerns about a particular subject to the United States or another government.¹ Further, respondent's isolated focus on a single document's words overlooks the fact that

[t]he significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.

¹ For example, if the United States had completely severed relations with Country X, and the head of that country subsequently wrote a letter to a newly inaugurated President that stated only "I congratulate you on your election," the Executive Order (unlike respondent) would recognize the impact on foreign relations that could result not just from releasing the words in the letter, but also from prematurely disclosing that the leader of Country X made any communication at all with the United States. Similarly, if the pro-Western prime minister of a hypothetical country sought to maintain a precarious domestic position by voicing in emphatic terms criticisms of the President of the United States, but then later expressed his views in a letter to the President in markedly more restrained terms out of his respect for the President or support of the relevant American policy, the Executive Order would permit protection of that unwritten "information" because of the harm to the Nation's foreign relations that discrediting the pro-Western government would entail.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); see also *CIA v. Sims*, 471 U.S. 159, 178-179 (1985).

Respondent next seizes upon that part of the definition of "[d]amage to the national security" that states that the analysis is "to include the sensitivity, value, and utility of that information." Exec. Order No. 12,958, § 1.1(l). That addendum does nothing to aid respondent's reading of the Order. As explained in our opening brief (at 30), one important measure of the "sensitivity" of information is the fact that the foreign government communicated it in confidence and continued at the time of a FOIA request to object to its disclosure in breach of that trust. Respondent's attempt to distinguish between the "sensitivity" of a document's contents (which he would deem covered by the Executive Order) and the foreign government's "sensitivity" about disclosure of those contents (which he would not protect), erects an artificial and, for all practical diplomatic purposes, inscrutable line between protected and unprotected communications. Furthermore, the ordinary meaning of the word "includ[es]" "is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Respondent attempts to distinguish *Bismarck* by pointing out (Br. 43) that "the formulation that does appear" in the Executive Order is "to include" rather than "includes." Why respondent thinks the infinitive of a verb rather than one of its active tenses fundamentally alters its meaning escapes us. Whether the word is "prescriptive" (*ibid.*) or descriptive, it is not *exhaustive*.²

² In fact, the "to include" language is designed to ensure that the concept of damage to the national security is *not* given a narrow scope. It requires that, in determining the harm that could result from disclosure, consideration be given not only to negative impacts in their own right, but also to the inherent and positive "value" or "utility" to the United States of controlling certain information.

c. Unable to support his cramped view of damage to national security with the actual text of the Executive Order, respondent relies (Br. 39-41) on words that are not there—that is, on the absence in the current Executive Order of a presumption in the prior Order that the release of "foreign government information" would damage the United States' foreign relations. See Exec. Order No. 12,356, § 1.3(b) and (c), 3 C.F.R. 169 (1983). Even if one assumes the highly questionable proposition that the absence of language is sufficient to overcome the Executive Branch's reasonable interpretation of the actual text of its own Executive Order, respondent's argument is to no avail. First, the present case was decided on the basis that the classified letter concerned the "foreign relations or foreign activities of the United States," not that it was "foreign government information." Pet. App. 7a & n.2. Nothing in the new Executive Order altered the manner in which "foreign relations or foreign activities" information is classified. See Exec. Order No. 12,958, § 1.5(d); Exec. Order No. 12,356, § 1.3(a)(5).

Second, even assuming it is relevant, elimination of the across-the-board presumption that disclosure of "foreign government information" will *always* harm national security because of the prospect of a broader impact on diplomatic communications plainly does not mean that the disclosure of such information will *never* harm the national security in that way. It simply means that such harm will no longer woodenly be presumed for every bit of information that is tied to a foreign official. Instead, the Executive Order requires that an actual judgment be made by a responsible Executive Branch official that the interest in maintaining the confidentiality of diplomatic discourse is relevant to and should be invoked for each document considered for classification.³

³ Other courts have recognized that the current Executive Order continues to protect against the harm arising from the breach of a foreign

Third, the flaw in respondent's reasoning is highlighted by the fact that the presumption of harm also was eliminated for "the identity of a confidential foreign source, or intelligence sources or methods." See Exec. Order No. 12,356, § 1.3(c). Yet there is no basis for extrapolating from that action the counterintuitive conclusion that the government intended to foreclose itself from determining in individual cases that an intelligence source or confidential foreign source communicated information against a background understanding or assumption of confidentiality, and that breach of that person's trust would seriously impair the government's ability to gather intelligence or foreign relations information in the future. See *Sims*, 471 U.S. at 169-180.

Respondent asserts (Br. 46 n.24) that, for intelligence sources and confidential foreign sources, the government could simply "identify and describe" the harm that would flow from disclosure of this "information." But respondent cannot have it both ways. If, as respondent's answer assumes, the Executive Order continues to include within the definition of "damage to the national security" the harm that arises solely from breaching the expectation of confidentiality of an intelligence source or confidential foreign source, notwithstanding the elimination of the prior Order's presumption to that effect, then the current Executive Order also must continue to afford such protection to foreign government information. Respondent's effort to elide the problem by asserting (*ibid.*) that confidential foreign sources and intelligence sources can be protected under Exemption 3 overlooks the fact that (unlike intelligence sources) no separate statute protects "confidential foreign sources" as such. In any event, the fact that Congress has chosen to protect

government's expectation of confidentiality. *McErlean v. United States Dep't of Justice*, No. 97 Civ. 7831, 1999 WL 791680, at *5 (S.D.N.Y. Sept. 30, 1999); *Students Against Genocide v. Department of State*, No. CIVA96-667, 1998 WL 699074, at *11 (D.D.C. Aug. 24, 1998); *Billington v. Department of Justice*, 11 F. Supp. 2d 45, 58 (D.D.C. 1998).

intelligence sources under a statutory scheme of its own making says nothing about the President's independent intent or ability to protect such information as he considers necessary in his own Executive Order.⁴

d. If there were any ambiguity in the Executive Order's text, the court of appeals should have deferred to the Executive Branch's reasonable interpretation of its language. See *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Indeed, deference to the Executive's interpretation of an Executive Order should be even greater than it is to an agency's construction of its own regulations. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-151 (1991). In the latter situation, the agency's regulation and ultimately its interpretation must correlate with the terms of an Act of Congress. With respect to Executive Orders, by contrast, the Executive Branch is wholly responsible for establishing the Order's operational goals, selecting the substantive criteria to regulate Executive Branch behavior, interpreting the Order's terms, and applying the Order in various factual contexts. The entire process is thus internalized to the Executive Branch and involves subjects of "predominant executive authority and of traditional judicial abstention." *Webster v. Doe*, 486 U.S. 592, 616 (1988) (Scalia, J., dissenting). Moreover, because the Order concerns foreign affairs and national security—matters steeped in a tradition of independent Executive authority and accumulated exper-

⁴ Respondent's constricted vision of damage to the national security also fails to account for the fact that the Executive Order specifically defines "foreign government information" and "confidential source" by reference to the foreign government's or individual's expectation of confidentiality. Exec. Order No. 12,958, § 1.1(d) and (k). The fact that the Order makes that expectation an important definitional criterion renders implausible the assertion that the Executive Branch must ignore the impact of a breach of that expectation in evaluating the damage to national security that would be caused by disclosure.

tise—the rule of deference to the Executive’s interpretation should apply with particular force.

Respondent’s contention (Br. 37 n.15) that the construction of the Executive Order by those whom the President expressly charged with its interpretation and implementation (see Gov’t Br. 3-4) merits no deference is baseless. Respondent objects (Br. 37 n.15) that petitioners’ withholding of the letter he requested did not rest on a settled interpretation of the Executive Order, yet fails to recognize that this litigation arose on the heels of the new Executive Order’s effective date. Both of the State Department declarations, which explain the basis for non-disclosure and articulate the Executive Branch’s construction of the Order, were filed within six months of the Order’s effective date, see Exec. Order. No. 12,958, § 6.2. Respondent offers no explanation why such a contemporaneous construction of the Order should not receive substantial deference.

Respondent’s extraordinary contention (Br. 28, 32, 37 n.15) that, in FOIA, Congress foreclosed judicial deference to the Executive’s interpretation of its own Order is unsupported by citation to any specific statement in FOIA’s text or legislative history evidencing such an unprecedented abandonment of traditional principles of administrative law and inter-branch comity.⁵ Absent compelling indications to the contrary, this Court should be loath to infer that Congress intended courts to afford the Executive Branch less deference in construing the language of *its own Order* addressing a subject matter (foreign affairs) that respondent concedes (Br. 15) “is the province and responsibility of the Executive,” than courts traditionally afford the Executive

⁵ In fact, the legislative history is to the contrary. See 120 Cong. Rec. 6811 (1974) (Rep. Erlenborn) (“[T]he court would not have the right to review the criteria under the Executive Order. The description ‘in the interest of the national defense or foreign policy’ is descriptive of the area that the criteria have been established in but does not give the court the power to review the criteria.”).

Branch’s construction of text enacted by Congress. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

e. Finding no basis for his position in the Executive Order, respondent repeatedly cites (Br. 41, 44) the President’s statement when he signed the Executive Order, that “we will no longer presumptively classify certain categories of information, whether or not the *specific information* otherwise meets the strict standards for classification.” (Respondent’s emphasis). But that statement supports our reading of the Executive Order. It shows that the President did not alter the underlying definition of “damage to the national security,” and thereby abandon a conception of harm to foreign relations that has been recognized since George Washington’s administration (see Gov’t Br. 17-21, 35-37).⁶ Instead, the President eliminated an across-the-board presumption that every single communication from a foreign government automatically requires classification and substituted in its place a directive that each “specific” piece of foreign government “information” be independently evaluated for the impact its disclosure would have on national security.

Respondent’s additional suggestion (Br. 44-45) that the Executive Branch’s reading of its own Order somehow un-

⁶ This conclusion is reinforced by numerous other passages in the President’s signing statement, which give assurance that the new Executive Order “still maintain[s] necessary controls over information that legitimately needs to be guarded in the interests of national security,” “safeguard[s] the information that we must hold in confidence to protect our Nation and our citizens[,]” “continue[s] to protect information that is critical to the pursuit of our national security interests,” “maintain[s] every necessary safeguard and procedure to assure that appropriately classified information is fully protected,” “can [be] trust[ed] to protect our national security,” and provides “a model for protecting our national security.” Resp. Br. Opp. App. 26a-28a; see also Exec. Order No. 12,958 (preamble) (the national interest requires certain information to be kept confidential to protect “our participation in the community of nations”).

dercuts its commitment to reform of the classification system is belied by his amici's concession that, "[d]uring the first three years of the Clinton Order's implementation, federal agencies declassified 131 percent more pages than during the previous sixteen years combined." Reporters Comm., *et al.* Br. 13 (citing Information Security Oversight Office, 1998 Report to the President (Aug. 31, 1999) (1998 Report)). Moreover, the State Department, which has been classifying information based on the reading of the Executive Order that respondent considers "meaningless" (Br. 45), accounts for only one percent of all national security classification decisions made by Executive Branch agencies, and has been commended for its exceptional declassification efforts. See 1998 Report at 5, 26.

2. Courts In FOIA Cases Must Afford The Utmost Deference To Executive Branch Judgments That Disclosure Could Reasonably Be Expected To Damage The National Security

a. Respondent insists (Br. 16-33) that this Court must adopt a construction of FOIA that "would empower a court to substitute its own [classification] decision for that of the agency" (*id.* at 31 (emphasis and citation omitted)), and thus would effectively vest in the judiciary the final judgment on what matters should be classified in the interests of national security. All this, respondent claims (Br. 33-35), can be done without raising any constitutional concerns. But, as demonstrated in our opening brief (at 15-27) with authority that respondent does not challenge (see Resp. Br. 15):

[T]he very nature of executive decisions as to foreign policy is political, not judicial. * * * They are delicate, complex, and involve large elements of prophecy. * * * They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). Because judgments about the harm to foreign relations and national security necessarily entail large elements of prediction, those predictive judgments "must be made by those with the necessary expertise in protecting classified information." *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside non-expert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction [of risk to national security] with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Ibid. (internal quotation marks, citation, and ellipsis omitted).⁷ Accordingly, the classification judgments of those "who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference." *Sims*, 471 U.S. at 179.⁸

⁷ Accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.") (emphasis added).

⁸ Amici Center for National Security Studies, *et al.*, claim (Br. 14-16) that Congress has long asserted control over national security information. While we do not dispute that Congress has some role in this area, as specifically demarcated by the Constitution (see, *e.g.*, Art. I, § 8; Art. II,

b. Before interpreting FOIA in such a constitutionally suspect manner, this Court would have to find the clearest expression of an intent by Congress to abandon centuries of congressional respect for the Executive's judgments concerning the confidentiality of national security information. See Gov't Br. 17-21. That evidence is wholly lacking.

First, respondent is correct that FOIA provides that courts "shall determine the matter de novo." 5 U.S.C. 552(a)(4)(B) (Supp. IV 1998). "But it is a 'fundamental principle of statutory construction (and, indeed, of language it-

§ 2, para. 2), neither amici nor respondent cites any authority for the proposition that Congress may assign to the Judicial Branch the power to substitute its own classification decisions for those of the Executive Branch. Cf. *Morrison v. Olson*, 487 U.S. 654, 677 (1988) ("duties of a non-judicial nature may not be imposed on judges holding office under Art. III of the Constitution"). Amici's only support for the existence of such a power, moreover, is a number of assertions of congressional power the constitutionality of which remains an open question. Compare Nat'l Sec., et al. Br. 15 n.15 with *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989). It also rests (Nat'l Sec., et al. Br. 15) upon a misreading of House and Senate rules that (i) in fact do not permit Congress to "declassify" (*ibid.*) anything, (ii) pertain only to disclosure of information in Congress's possession (as opposed to information in the Executive Branch's possession), and (iii) permit public release of classified information over a Presidential objection only under circumstances so extraordinary that we are aware of no instance in which they were ever successfully invoked. Finally, amici's argument that this Court has never invalidated an Act of Congress on separation of powers grounds that did not violate a specific provision of the Constitution is wrong (see *Metropolitan Wash. Airports Auth., Inc. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Myers v. United States*, 272 U.S. 52 (1926)); is irrelevant (see Gov't Br. 15 (citing express textual authority for President's control over national security information); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 488-489 (1989) (Kennedy, J., concurring) (statute that "interfere[s] with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution" violates that same constitutional provision)); and is beside the point, because we do not argue that FOIA, as properly construed, is unconstitutional, but rather that the court of appeals' erroneous construction of FOIA and the Executive Order raises substantial constitutional concerns.

self) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno v. Koray*, 515 U.S. 50, 56 (1995). Thus, "[a]s [this Court's] decisions underscore, a characterization" of statutory terms, like *de novo*, that is "fitting in certain contexts may be unsuitable in others." *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). Such caution is particularly appropriate when courts construe statutory language that arises at the delicate intersection of Congress's power to legislate and the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

The starkest evidence that Congress intended a particular and nuanced application of *de novo* review in Exemption 1 cases is the fact that, in the immediately following sentence of the judicial review provision, FOIA directs that, "[i]n addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the * * * technical feasibility" of making records available in electronic format. 5 U.S.C. 552(a)(4)(B) (Supp. IV 1998). Given (i) Congress's addition of the "substantial weight" language in 1996 against the backdrop of an unbroken wall of judicial precedent according "substantial weight" to Executive Branch declarations describing the basis for classification judgments in national security cases⁹; (ii) the 1974 Conference Report's

⁹ At the time Congress added the "substantial weight" language to FOIA's text in 1996, no fewer than 46 court of appeals' decisions had held that courts must afford "substantial weight" to agency affidavits in national security exemption cases (predominantly arising under Exemption 1, but some also arising under Exemption 3). See *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *Oglesby v. United States Dep't of Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996); *Jones v. FBI*, 41 F.3d 238, 244 (6th Cir. 1994); *McDonnell v. United States*, 4 F.3d 1227, 1242-1244 (3d Cir. 1993); *Maynard v. CIA*, 986 F.2d 547, 554-556 & n.7 (1st Cir. 1993); *Krikorian v. De-*

explicit statement that courts would give "substantial

partment of State, 984 F.2d 461, 464 (D.C. Cir. 1993); *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *Wiener v. FBI*, 943 F.2d 972, 980 (9th Cir. 1991), cert. denied, 505 U.S. 1212 (1992); *Bowers v. U.S. Dep't of Justice*, 930 F.2d 350, 357 (4th Cir.), cert. denied, 502 U.S. 911 (1991); *Fitzgibbon v. CIA*, 911 F.2d 755, 762, 766 (D.C. Cir. 1990); *Patterson v. FBI*, 893 F.2d 595, 601 (3d Cir.), cert. denied, 498 U.S. 812 (1990); *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 315 (D.C. Cir. 1988); *American Friends Serv. Comm. v. Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987); *King v. United States Dep't of Justice*, 830 F.2d 210, 225-226 (D.C. Cir. 1987); *Goldberg v. United States Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987), cert. denied, 485 U.S. 904 (1988); *Simmons v. United States Dep't of Justice*, 796 F.2d 709, 711 (4th Cir. 1986); *Miller v. United States Dep't of State*, 779 F.2d 1378, 1383, 1387 (8th Cir. 1985); *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985); *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C. Cir. 1985); *Miller v. Casey*, 730 F.2d 773, 776, 777 (D.C. Cir. 1984); *Davis v. CIA*, 711 F.2d 858, 860 (8th Cir. 1983), cert. denied, 465 U.S. 1035 (1984); *Afshar v. Department of State*, 702 F.2d 1125, 1131 (D.C. Cir. 1983); *Ingle v. Department of Justice*, 698 F.2d 259, 268 (6th Cir. 1983), abrogated on other grounds, *United States Dep't of Justice v. Landano*, 508 U.S. 165 (1993); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982); *Hrones v. CIA*, 685 F.2d 13, 18 (1st Cir. 1982); *Taylor v. Department of Army*, 684 F.2d 99, 106-107 (D.C. Cir. 1982); *Carlisle Tire & Rubber Co. v. United States Customs Serv.*, 663 F.2d 210, 216, (D.C. Cir. 1980); *Stein v. Department of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Military Audit Project v. Casey*, 656 F.2d 724, 738, 741, 745, 747 (D.C. Cir. 1981); *Phillippi v. CIA*, 655 F.2d 1325, 1332 (D.C. Cir. 1981); *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980); *Sims v. CIA*, 642 F.2d 562, 571 (D.C. Cir. 1980); *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980); *Halperin v. CIA*, 629 F.2d 144, 147-148, 150, 152-153 (D.C. Cir. 1980); *Founding Church of Scientology v. National Sec. Agency*, 610 F.2d 824, 830 n.54 (D.C. Cir. 1979); *Hayden v. National Sec. Agency/Central Sec. Serv.*, 608 F.2d 1381, 1384, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Goland v. CIA*, 607 F.2d 339, 350 n.64, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); *Founding Church of Scientology v. Bell*, 603 F.2d 945, 951 (D.C. Cir. 1979); *Terkel v. Kelly*, 599 F.2d 214, 215 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Irons v. Bell*, 596 F.2d 468, 471 n.5 (1st Cir. 1979); *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978); *DiViao v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978); *Halperin v. Department of State*, 565 F.2d 699, 705 (D.C. Cir. 1977); *Weissman v. CIA*, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977); *Bell v. United States*, 563 F.2d 484, 487 (1st Cir. 1977).

weight" to an agency's "unique insights into what adverse [e]ffects might occur as a result of public disclosure," S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974); and (iii) the absence of any other established use of the "substantial weight" standard under FOIA to which Congress could have been referring, this 1996 amendment provides a powerful textual confirmation that de novo review under FOIA operates (as the Constitution requires and as Congress intended in 1974) with special delicacy and utmost deference to agency expertise in national security cases.¹⁰ So considered, respondent's insistence that the meaning of "de novo" is "fixed" and unwavering (Br. 18 n.10) rings hollow.¹¹

Second, the Conference Report on the 1974 amendments to FOIA, in which Exemption 1 was enacted in its current form, establishes Congress's intent that courts, "in making de novo determinations in section 552(b)(1) cases," accord "substantial weight" to an agency's "unique insights into what adverse [e]ffects might occur as a result of public disclosure," and thus of the necessity of classification in the national security area. See S. Conf. Rep. No. 1200, *supra*, at 11. Members of Congress echoed that expectation. See Gov't Br. 45 n.41. Respondent's lengthy review of the 1974 legislative history (Br. 24-33) never comes to grips with that straightforward (and now codified) language of the Conference Report, which specifically reconciles the standard of "substantial weight" with the provision for de novo review.

Moreover, in securing final passage of the bill, as well as in overriding President Ford's veto, sponsors and supporters of

¹⁰ See also *Sims*, 471 U.S. at 179 (national security judgments of Executive officials under FOIA Exemption 3 "are worthy of great deference").

¹¹ Cf. *NationsBank*, 513 U.S. at 262 ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

the legislation repeatedly cited the quoted language of the Conference Report as critical to their understanding of the effect of the amendments to Exemption 1.¹² Sponsors also explained that the language was designed to "accommodate" President Ford's concerns both before and after the veto.¹³ Indeed, Representative Moorhead, the bill's House sponsor, explicitly advised his colleagues that the final bill required deference. 120 Cong. Rec. 34,166 ("great weight"); see also *id.* at 34,167 (judge would not decide "whether he himself would have classified the document in accordance with his own ideas of what should be kept secret").¹⁴ Furthermore, there is no merit to respondent's contention (Br. 26-27) that Congress's rejection of a version of the bill that created a *presumption* that agency judgments were reasonable forecloses all *deference* to the agency.¹⁵

¹² See 120 Cong. Rec. 36,866 (1974) (Sen. Kennedy) (courts would be expected to give agency affidavits "considerable weight"); *id.* at 36,623 (Rep. Moorhead); *id.* at 34,166, 36,627 (Rep. Ehrlenborn); *id.* at 36,630 (Rep. Horton); *id.* at 36,628-36,629 (Rep. Rousselot); *id.* at 36,628 (Rep. Broomfield); *id.* at 36,629 (Rep. Aspin); *id.* at 36,870 (Sen. Muskie); *id.* at 36,880 (Sen. Ribicoff); cf. *id.* at 6813 (Rep. Mink) (advocating deference before Conference Report adopted); *id.* at 6804 (Rep. Matsunaga) (same); *id.* at 6808 (Rep. McCloskey) (same).

¹³ See 120 Cong. Rec. 36,244, 36,622 (1974) (Rep. Moorhead); *id.* at 33,159 (letter from Sen. Kennedy and Rep. Moorhead to President Ford).

¹⁴ Respondent's assertion (Br. 30 n.13) that Representative Moorhead did not support deference parses the Representative's statements beyond recognition. In reality, Representative Moorhead explained that "no one familiar with the legislative history could ever imagine that Members of Congress could almost unanimously vote to write into law" amendments that allowed a court to overturn an agency's "reasonable" conclusion that "disclosure of a document would endanger our national security." 120 Cong. Rec. 36,623 (1974). It was that "obviously dangerous provision"—advanced here by respondent—that Congress rejected. *Ibid.*

¹⁵ See *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492-493 (Fed. Cir. 1997) ("[M]uch of the confusion in this area of the law arises from commingling the notion of a presumption of correctness with the notion of deference — two notions that are designed to serve separate functions. Unlike the burden of production and burden of persuasion, each of which allocates roles between the two parties to a litigation, deference

Third, the fact that FOIA directs courts to "determine the matter de novo" simply begs the question of precisely what "matter" is to be reviewed de novo in Exemption 1 cases. Unlike most other FOIA exemptions, for which Congress set the substantive terms and conditions for withholding, Exemption 1 specifically defers to the President's own formula for classifying national security information. Thus, the text of Exemption 1 envisions a court reviewing de novo only the discrete inquiries whether the "matters" exempted from disclosure are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1). Those inquiries do not, by their nature, entail more than ensuring that the agency has applied only those classification criteria and categories identified in the Executive Order, followed the procedures outlined in the Order for classifying information, and articulated a substantive classification judgment that neither is foreclosed by the Order's text nor lacks any plausible basis.¹⁶

Nothing in the text of Exemption 1 or FOIA's provision for de novo review, in other words, compels courts to probe behind the Executive Branch's reasoned explanation and second-guess the Executive's predictive and experiential judgments about whether and how the release of foreign affairs information will adversely impact the United States' diplomatic relations. Indeed, even respondent concedes (Br. 28) that judicial superintendence of the agency's factual conclusions must halt at this point. But if FOIA's de novo

is a legal concept that allocates roles between one adjudicating tribunal and another.") (citation omitted).

¹⁶ Cf. *Aronson v. IRS*, 973 F.2d 962, 967 (1st Cir. 1992) ("[O]nce a court determines that the statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA de novo review normally ends. * * * Any further review must take place under more deferential, administrative law standards.").

provision permits deference to agency factual determinations, it surely is sufficiently capacious to permit deference to those delicate and seasoned predictive judgments about foreign relations repercussions that Executive Branch officials are singularly well-positioned to make and that fall outside the responsibility and expertise of the Judicial Branch. See S. Conf. Rep. No. 1200, *supra*, at 11 ("substantial weight" should be given to an agency's "*unique insights* into what adverse [a]ffects might occur as a result of public disclosure") (emphasis added).

Respondent's insistence that the Executive Order must "specifically authorize[]" (Br. 19) each classification decision misapprehends its terms and operation.¹⁷ The Order requires only that an Executive Branch official "determine[]" that the appropriate level of damage "reasonably could be expected to result" from disclosure, and then articulate the basis for that judgment. Exec. Order No. 12,958, § 1.2(a)(4). The word "determine" envisions a conclusion based on investigation and reasoning, or a reasoned choice between viable alternatives. See *Webster's Third New Int'l Dictionary* 616 (1986). The requisite decision, moreover, is not that damage definitively will or will not result, but that it "reasonably could be expected" to occur. Thus, in an Exemption 1 case, a court could not order release of a document that has been classified under the Executive Order unless the court decided—viewing the matter from the perspective of responsible Executive Branch officials, who are acting on behalf of the President and have expertise and insights that are themselves entitled to the utmost judicial deference—that those officials could not permissibly determine, on the basis of all information they deem relevant, that identified

¹⁷ Contrary to respondent's characterization (Br. 19), FOIA does not require that each classification judgment be "specifically authorized," but only that the classification be shown to have been made pursuant to "specifically authorized * * * criteria." 5 U.S.C. 552(b)(1).

harm to the national security could reasonably be expected to result from disclosure.

It follows, then, that classification judgments in the national security arena are not amenable to judicial labeling as "right" or "wrong," "authorized" or "unauthorized." No predicate "showing" (Resp. Br. 13) or quantum of courtroom proof is required by the Executive Order (or FOIA) to undergird every calibrated judgment about damage to national security. Rather than being provable as "right" or "wrong," classification judgments fall along a spectrum from the most plausibly correct to the implausible. Yet nothing in FOIA directs courts (much less provides them the equipment or guidance necessary) to sift out the most plausible from the moderately plausible classifications and order disclosure of the latter, or to shelter the moderately plausible while exposing the merely plausible. Permitting judicial invalidation of only those classification judgments that fall at the implausible end of the spectrum is thus the only form of *de novo* review that successfully reconciles the limited textual scope of the Exemption 1 inquiry, the language of the Executive Order, the realities of national security classification decisionmaking, and the Constitution's separation-of-powers mandate.¹⁸

c. Finally, the complaint of amici Center for National Security Studies, *et al.* (Br. 22-25) that enforcing Congress's requirement of deference to Executive Branch judgments in national security cases is inconsistent with FOIA's goal of encouraging governmental openness misses the mark. It in fact is respondent's, amici's, and the court of appeals' approach that encourages the President to adopt broad, categorical, and inflexible classification criteria. For, under their

¹⁸ On November 19, 1999, the President made a minor amendment to the Executive Order that pertains to the timing of automatic declassification and a technical amendment that pertains to the Information Security Oversight Office. We have lodged a copy of that Order with the Clerk of this Court.

approach, as soon as an Executive Order permits any individualized evaluation of the need for classification of foreign government communications, the classification judgments of Executive Branch officials will suddenly become subject to judicial second-guessing across the country. The end result of respondent's and his amici's position would thus be a decrease in the disclosure of national security information, either because the erratic protection of confidences will deter foreign governments from sharing vital information with the United States government in the first place,¹⁹ or because the President will be forced to adopt sweeping, automatic, and wooden classification rules.

* * * * *

For the reasons stated in our motion dated November 23, 1999, the Court should vacate the judgment of the court of appeals and remand with directions that the case be dismissed as moot. If the Court does not dispose of this case on mootness grounds, then, for the foregoing reasons and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1999

¹⁹ See *Sims*, 471 U.S. at 175 (if confidentiality is not protected, "many [sources] could well refuse to supply information to the Agency in the first place"); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984) ("[M]uch if not all of the information * * * would not find its way into the public realm even if we refused to recognize the privilege, since under those circumstances the information would not be obtained by the Government in the first place.").

(10)

Supreme Court, U.S.

FILED

NOV 23 1999

No. 98-1904

OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**MOTION TO VACATE THE JUDGMENT
OF THE COURT OF APPEALS
AND REMAND THE CASE WITH DIRECTIONS
TO DISMISS THE CASE AS MOOT**

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID R. ANDREWS
Legal Adviser
Department of State
Washington, D.C. 20520

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In the Supreme Court of the United States

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DEPARTMENT OF JUSTICE, AND UNITED STATES
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v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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**MOTION TO VACATE THE JUDGMENT
OF THE COURT OF APPEALS
AND REMAND THE CASE WITH DIRECTIONS
TO DISMISS THE CASE AS MOOT**

Pursuant to Rule 21.2(b) of the Rules of this Court, the Solicitor General, on behalf of the United States, the Department of Justice, and the Department of State, respectfully moves that the Court vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case to that court with directions to dismiss the case as moot. The case is currently scheduled for oral argument on December 8, 1999.

This case involves a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for a copy of a letter, dated July 28, 1994, sent by the Home Office of the British government to the United States Depart-

ment of Justice concerning the extradition of respondent's client, Sally Ann Croft, and another person from the United Kingdom to the United States, to stand trial on charges of conspiring to murder the United States Attorney for the District of Oregon. The extradition was a sensitive matter between the two nations. The letter from the Home Office was classified and withheld under Exemption 1 of FOIA, 5 U.S.C. 552(b)(1), because it constituted a confidential communication by a foreign government and the breach of that confidentiality by the United States could reasonably be expected to harm the national security. The United States' decision to withhold the document was based, in large part, on the position of the British government (in which our government concurred) that such correspondence between governments is ordinarily confidential and that the letter accordingly should remain confidential.

In his brief on the merits in this Court, filed on November 19, 1999, respondent disclosed for the first time a letter dated November 16, 1994, that he received from the British Consul in Seattle, Washington, that disclosed much of the substance of the letter that is the subject of this FOIA case. We had previously been unaware of the Consul's November 1994 letter, and we asked that it immediately be brought to the attention of the British Home Office. The Home Office reports that, insofar as it has been able to ascertain, neither it nor the Foreign Office in London has any record or recollection of having seen the Consul's letter. In light of that letter, the British government has informed the Department of State that it no longer insists upon maintaining the confidentiality of the July 1994 letter that is the subject of this FOIA suit and, under the circumstances, it has requested that the United States release

the letter. The Department of State concurs in the British government's judgment in light of these new circumstances, and has accordingly declassified the letter and sent a copy to respondent. This case therefore is now moot.

Because of these changed circumstances brought about by respondent's disclosure of the letter at this late stage of the case, the independent action of the British government in light of the letter of its Consul, and the national security context in which this case arises, we request that the Court vacate the judgment of the court of appeals and order that the case be dismissed as moot. That disposition will remove the precedential force of the Ninth Circuit's decision, and thereby will do what is possible to prevent that decision from chilling future confidential communications between the United States and the British government and other foreign governments.

STATEMENT

1. On November 29, 1994, respondent submitted FOIA requests to the Department of Justice and the Department of State for a copy of a letter sent by the British Home Office to the Director of the Justice Department's Office of International Affairs in which the British government "convey[ed] certain concerns of the U.K. Government" regarding the United States' criminal prosecution of respondent's client. Pet. App. 54a; see also *id.* at 2a-3a.¹ As it commonly does, the State Department requested the views of the British

¹ The Justice Department had possession of the letter but, because the letter had been created by a foreign government, it forwarded the letter to the State Department for response to the FOIA request. Pet. App. 3a; see also 28 C.F.R. 16.4(c); 5 U.S.C. 552(a)(6)(B)(iii)(III) (Supp. IV 1998).

government on disclosure. *Id.* at 58a, para. 8. The British government responded that it was “unable to agree to [the letter’s] release,” because “the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence.” Resp. Br. in Opp. App. 30a; Pet. App. 3a. The British government further explained that, “[i]n this particular case,” a request by representatives of the defendants to see the letter had been “refused on grounds of confidentiality” by the British government. Resp. Br. in Opp. App. 30a. The State Department subsequently classified the letter as “confidential” and informed respondent that the letter would not be released because it fell within FOIA Exemption 1. Pet. App. 3a-4a; J.A. 42-43. The Justice Department denied respondent’s FOIA request on the same ground. J.A. 50-51.

2. Respondent then filed suit under FOIA, 5 U.S.C. 552(a)(4)(B), to compel release of the letter. The government introduced the declarations of two State Department officials. The Sheils declaration explained that the letter “was intended by the U.K. Government to be held in confidence” and that violation of that “clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments.” Pet. App. 52a-53a.

The Kennedy declaration elaborated that “[d]iplomatic confidentiality obtains even between governments that are hostile to each other and even with respect to information that may appear to be innocuous,” and “[w]e expect and receive similar treatment from foreign governments.” Pet. App. 56a-57a. For that

reason, disclosure of the letter “in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government,” because it “may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them.” *Id.* at 57a. The resulting “reluctan[ce]” of other governments “to provide sensitive information to the U.S. in diplomatic communications” would “damag[e] our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role.” *Ibid.* After initially ordering the letter disclosed, the district court reconsidered its decision after undertaking *in camera* review and ruled that the letter was exempt from disclosure under FOIA Exemption 1, 5 U.S.C. 552(b)(1).

3. Respondent appealed. While the appeal was pending, the government in Great Britain changed from the Conservative Party to the Labour Party. The United States inquired whether the new government, like its predecessor, wished to continue to maintain the confidentiality of the letter. The United States was advised that the British government continued to regard disclosure to be “out of the question.” As we pointed out in our certiorari petition (at 10 n.4), counsel for the United States informed the court of appeals of the new British government’s view in response to a question at oral argument.

4. a. A divided panel of the court of appeals subsequently reversed the district court’s judgment and ordered the letter disclosed. Pet. App. 1a-20a. The majority concluded that the “government never met its burden of identifying or describing any damage to

national security that will result from release of the letter." *Id.* at 9a. The court declined to give any deference to the Executive's identification, in the Sheils and Kennedy declarations, of the particular damage to foreign relations that would result from disclosure of the letter, because, in the court's view, the government had failed to make "an initial showing which would justify deference." *Id.* at 16a. The court therefore decided that it should only "look to the individual document itself," not the consequences of a breach of the British government's expectation of confidentiality, in assessing the potential harm to national security. *Ibid.* After reviewing the document *in camera*, the majority labeled the letter "innocuous," stating that the majority "fail[ed] to comprehend how disclosing the letter at this time could cause 'harm to the national defense or foreign relations of the United States.'" *Id.* at 17a. The court accordingly reinstated the grant of summary judgment for respondent. *Id.* at 18a.

b. Judge Silverman dissented, Pet. App. 18a-20a, finding "no basis in the record to conclude otherwise than that * * * release [of the letter] would cause damage to the national security," *id.* at 20a. He emphasized that the government's declarations of confidentiality and harm were uncontroverted and, indeed, were corroborated by the British government's own refusal on grounds of confidentiality to release the letter. *Id.* at 18a-19a.

5. The United States then sought a stay of the Ninth Circuit's mandate, supported by a declaration of the Acting Secretary of State, Strobe Talbott. Pet. App. 60a-64a. He explained that disclosure "could reasonably be expected to cause damage to the foreign relations of the United States" and, in particular, could impair the "general bilateral relationship between the

U.S. and the U.K. on law enforcement cooperation and other matters" by "dealing a setback to U.K. confidence in U.S. reliability as a law enforcement partner." *Id.* at 63a. The court of appeals then stayed the issuance of its mandate. J.A. 6.

6. The United States filed a petition for a writ of certiorari on May 27, 1999. Prior to filing that petition, the Solicitor General again verified, through high-level State Department officials, that the British government continued to be of the view that the letter should not be disclosed.

This Court granted the petition for a writ of certiorari on September 10, 1999. The United States filed its opening brief on October 22, 1999, and respondent filed his brief on November 19, 1999. The government's reply brief is currently due on December 1, 1999, and the case is scheduled for oral argument on December 8, 1999.

7. a. In his brief on the merits filed on November 19, respondent reveals for the first time in this litigation that, on November 16, 1994, the British Consul in Seattle, Washington, wrote respondent a letter in which the Consul disclosed a significant portion of the contents of the letter that is the subject of this case, stating that the letter "stressed the Home Secretary's concern that questions of local prejudice were examined most carefully during the pretrial process." Resp. Br. 38 n.17; see also *id.* at 6, 48-49. We previously were unaware of the November 16, 1994, letter from the British Consul.

Respondent never informed the United States or the district court at any stage of the proceedings that such a disclosure had been made by a British official, despite the fact that the United States' defense of the withholding of the Home Office's July 1994 letter from

respondent under FOIA attached vital importance to the British government's request that the confidentiality of the document be preserved. Respondent again declined to mention the Consul's letter in his motion to set aside the district court's judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, even though that motion turned upon a claim that the British government had disclosed the contents of the letter to an unidentified acquaintance of respondent in a telephone conversation. See Gov't Br. 8 n.5; J.A. 52-56 (affidavit of respondent).

Respondent likewise did not inform the court of appeals of the letter he received from the British Consul—in his briefs; at (or after) the oral argument, when counsel for the government told the court that the new Labour Government regarded disclosure of the letter to be “out of the question”; at the rehearing stage; or when the United States moved to stay the court of appeals' mandate.

Nor did respondent inform this Court, in his brief in opposition to the petition for a writ of certiorari, that an official of the British government had already disclosed significant details about the subject matter of the letter to him.

b. Upon receiving respondent's brief and a copy of his lodging of the Consul's letter, we immediately had a copy of that letter brought to the attention of the British Home Office. The Home Office has responded in the attached letter, dated November 23, 1999, to the Department of State. App. A, *infra*, 1a-2a. The Home Office's letter states that, insofar as the Home Office has been able to ascertain, neither that Office nor the Foreign Office had previously seen the letter sent to respondent by the British Consul in Seattle. The letter goes on to reiterate the British government's position

that it “does continue to attach great importance, as I know does the U.S. Government, to according the highest measure of confidentiality to communications between our two Governments.” App. A, *infra*, 1a. “Without prejudice to that important principle,” however, the Home Office states that, in view of the previous partial disclosure of the contents of the July 1994 letter by the British Consul, the Home Secretary and Foreign Secretary have determined that the British government no longer insists upon maintaining the confidentiality of that letter and therefore “believe that an exception to the normal rule of confidentiality for such intergovernmental communications should be made.” *Ibid.* Accordingly, the Home Office has informed the Department of State that the British government no longer has an objection to release of the letter to respondent and that, under the circumstances, it requests that a copy of the letter be furnished to him.

In light of respondent's disclosure of the letter he received from the British Consul, his lodging of the Consul's letter with this Court as a matter of public record, and the request by the Home Office and Foreign Office that the July 1994 letter to the Department of Justice be released now that they have learned of the disclosure by the British Consul, the State Department has determined that disclosure of the letter no longer could reasonably be expected to cause damage to the national security. See Exec. Order No. 12,958 § 1.3(a)(3) (3 C.F.R. 333 (1996)). As reflected in the attached documents, the State Department accordingly has declassified the letter and has sent a copy to respondent through his FOIA counsel, Mr. Gregory Workland.

ARGUMENT

The foregoing developments, which have compelled the United States to conclude that it must release the letter to respondent, render this case moot. See, e.g., *Anderson v. United States Dep't of Health & Human Servs.*, 3 F.3d 1383, 1384 (10th Cir. 1993) (agency's disclosure of requested documents moots FOIA case); *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (agency's disclosure to requester of the material sought under FOIA renders the case moot because the court has "no further judicial function to perform under the FOIA"). In the absence of a continuing controversy between the United States and respondent, the case is nonjusticiable under Article III of the Constitution. See, e.g., *Preiser v. Newkirk*, 422 U.S. 395, 401-402 (1975). An actual controversy must exist at all stages of appellate review, including in this Court. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994).

If a case becomes moot pending this Court's review, "this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Bonner Mall*, 513 U.S. at 21. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot * * * pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 22 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur in such circumstances "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. As we explain below, vacatur of the court of

appeals' judgment is particularly appropriate in this case. Accordingly, the judgment of the court of appeals should be vacated and the case remanded to that court with directions to order the vacation of the district court's judgment and the dismissal of the case as moot. See *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (ordering that disposition of a moot case).

1. Vacatur is appropriate first because "unilateral action of the party who prevailed in the lower court" has denied the United States the opportunity to seek review of the Ninth Circuit's judgment. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (quoting *Bonner Mall*, 513 U.S. at 23). Respondent's prolonged and inexplicable failure—until his merits brief in this Court—to disclose that an official of the British government had revealed to him significant details about the subject matter of the classified letter forced the United States, the district court, the court of appeals, and this Court at the petition stage to adjudicate this FOIA case "upon a record improperly made up." *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936). Furthermore, having undertaken the extraordinary step of attempting to place before this Court factual information that is not newly discovered and is outside the record,² respondent cannot deny the

² See, e.g., *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-158 n.16 (1970) ("Manifestly, it [an unsworn statement of a witness] cannot be properly considered by us in the disposition of the case."); *Russell v. Southard*, 53 U.S. 139, 159 (1851) ("It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal. And,

obvious relevance of the Consul's letter to his FOIA request and to the government's defense.

Respondent's attempt (Br. 38 n.17) to justify his tardy revelation of the Consul's letter as prompted by a need to respond to the statement in our brief on the merits in this Court (at 10 n.6) that the Labour Party government opposed disclosure is entirely without merit. The footnote, which appeared in our petition (at 10 n.4) as well as our merits brief, stated that counsel for the government had informed the *court of appeals* during oral argument that the then-newly installed Labour government, like its predecessor, considered disclosure to be out of the question.³ Respondent fails to explain why, if he considered disclosure of the Consul's letter to be properly responsive to the government's notification of the new Labour government's views, he did not introduce the Consul's letter into the record or even refer to it (1) during his rebuttal argument in the court of appeals, (2) in a supplemental brief calling the court of appeals' attention to the letter, (3) in his response to the government's petition for rehearing and suggestion of rehearing en banc, (4) when the government sought a stay of the mandate in the court

according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal.").

³ The Labour government's view on disclosure obviously could not have been obtained earlier by the United States because there was no Labour government until May 1997, at which point the case was already pending before the court of appeals. The information was offered, moreover, in response to a question from the court, rather than unilaterally volunteered by counsel for the government. Respondent, by contrast, has been in possession of the Consul's letter since before he filed his FOIA request and offers the information now of his own initiative.

of appeals, or (5) in his brief in opposition to our petition for a writ of certiorari in this Court. See Pet. 10 n.4.⁴

It is respondent's sudden revelation of information that he has possessed since before the litigation commenced that prompted the British government's change in position about maintaining the confidentiality of the Home Office's July 1994 letter to the Department of Justice and thus set in motion developments that have led to release of the letter. As the British government's and the United States' reaction to the Consul's letter evidence, had respondent disclosed the letter earlier, this litigation would have either never commenced or terminated long before our petition to this Court. In *Arizonans for Official English*, this Court concluded that a respondent's failure to disclose to the court of appeals information that would have mooted her case merited vacatur. "It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment" through the suppression of important information, "take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment." 520 U.S. at 75 (this Court's brackets); see also *Bonner Mall*, 513 U.S. at 26 (noting "the emphasis on fault in our decisions" regarding vacatur). Nor will vacatur of the court of appeals' judgment harm respondent, since the letter that he sought to obtain in this FOIA action has now been released to him.

2. It also is significant that release of the letter to respondent has been occasioned by the independent

⁴ For purposes of the record before this Court, the government's representation to the court of appeals is as much a part of the record as the portion of the oral argument transcript that respondent cites to support his merits arguments. See Resp. Br. 12 n.9.

decision of the British government following respondent's recent disclosure, not by unilateral and voluntary action of the Department of State and the Department of Justice, which are the parties to this litigation. See *Anderson v. Green*, 513 U.S. at 560 (distinguishing *Bonner Mall* and ordering vacatur because the party seeking relief from the judgment below did not cause nonjusticiability by voluntary action). The decision of the Department of State to classify the Home Office letter to the Department of Justice was based in large part on the British government's request that the usual confidentiality of such correspondence between governments be maintained in this case. As explained above (see pp. 4-7, *supra*) and in our opening brief (at 5-8, 11, 27-50), the State Department properly determined that release of the letter in contravention of the British government's expectation of confidentiality reasonably could be expected to damage the national security of the United States by undermining the trust of the British government and other foreign governments in the confidentiality of their communications with the United States.

The unilateral decision by the British Home Office and Foreign Office, once they learned of the November 16, 1994, letter from the British Consul, to respond to the British government's request to the Department of State that the letter be kept confidential and indeed their request that the United States not release the letter—fundamentally altered the circumstances underlying the State Department's prior classification decision and required a fresh determination by our government. Thus, it is the British government's decision in light of respondent's stated disclosure that has deprived the United States of the opportunity to have this Court review the Ninth Circuit's unprecedented

holding denying deference to Executive Branch declarations in a national security exemption case. See Pet. 12-20. That decision by the British government also leaves the United States unable to seek review on the merits in this Court of the Ninth Circuit's determination that the Executive Order does not permit classification based on the harm arising from the very act of disclosure, even though that judgment was made without any deference to the Executive Branch's interpretation of its own Executive Order. See Pet. 21-28. The consequences of the combined actions of respondent and the British government should not be visited upon the United States government and the foreign relations and national security interests of this country. See *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916) ("[T]he ends of justice exact that the judgment below should not be permitted to stand when without any fault of the government there is no power to review it upon the merits.").

3. The adverse consequences for the national security of the erroneous ruling by the court of appeals extend well beyond the circumstances of this case; they threaten the same harm to the foreign relations of the United States generally that led the United States to request review by this Court in the first place. In *Arizonaans for Official English*, this Court recognized that federalism concerns were properly factored into the equitable analysis of whether a lower-court judgment should be vacated once a case has become moot. 520 U.S. at 75. The court of appeals' judgment here implicates equally fundamental concerns going to the structure of our government. As explained in our petition and opening brief, the Ninth Circuit held that no deference was owed to the Executive Branch officials' expla-

nation of the basis for classification of the British government's letter, because deference was not "justified]" by an unspecified "initial showing," and because the harm identified by State Department officials did not fall within the court's own straitened view of what constitutes damage to the national security. Pet. App. 13a-14a, 16a. However, the Executive Branch's "authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President * * * as head of the Executive Branch and as Commander in Chief," and thus "exists quite apart from any explicit congressional grant." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). For that reason, unlike the Ninth Circuit here, "courts traditionally have been reluctant to intrude upon the authority of the Executive" over the management of national security information, because of "the generally accepted view that foreign policy [is] the province and responsibility of the Executive." *Egan*, 484 U.S. at 529-530 (quoting *Haig v. Agee*, 453 U.S. 280 293-294 (1981)). With respect to that area of Presidential responsibility, "the courts have traditionally shown the *utmost deference*." *Egan*, 484 U.S. at 530 (emphasis added) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)); accord *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (quoted at Gov't Br. 21); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803). Accordingly, "[e]ven if there is some room for the judiciary to override the executive determination [on classification], it is plain that the scope of review must be exceedingly narrow." *New York Times Co. v. United States*, 403 U.S. 713, 758 (1971) (Harlan, J., dissenting). The court of appeals thus construed its role under FOIA in a manner that creates not only a conflict

in the circuits but serious separation of powers concerns.

The court of appeals' decision refusing to afford any deference to the conclusion of Executive Branch officials that the harm to national security against which the Executive Order protects includes the harm arising from the very act of disclosure likewise exceeded the proper boundaries of judicial review and, if permitted to stand, would significantly handicap the government's ability to protect foreign government communications. In *Haig v. Agee*, for example, this Court recognized that "the Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance of confidentiality* so essential to the effective operation of our foreign intelligence service." 453 U.S. at 307 (emphasis added). "[I]t is elementary that the successful conduct of international diplomacy * * * require[s] both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept." *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring).

Vacatur of the court of appeals' now unreviewable judgment is thus of great importance to the Executive Branch's ability to conduct foreign relations and administer its own Executive Order in a manner that protects vital diplomatic interests. In the absence of a single, uniform rule governing the standard of deference owed Executive Branch classification decisions under Exemption 1, FOIA plaintiffs will have an incentive to file suit within the circuit that accords classification judgments the least amount of deference. From a practical perspective, a lack of cohesion in the judicial standards governing review of classification

decisions by the Executive will deny Executive Branch officials and foreign governments a stable framework within which to engage in candid exchanges of diplomatic information, thereby creating a real danger of "restricting the flow of essential information to the Government." *FBI v. Abramson*, 456 U.S. 615, 628 n.12 (1982). It will be of little solace to those United States diplomats whose assurances of confidentiality would be rendered empty promises under the Ninth Circuit's decision—or to foreign governments whose secrets would be exposed within the Ninth Circuit—that their expectation of confidentiality might have carried the day in another region of the United States. From the foreign government's perspective and from ours, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Relatedly, the prospect that courts may make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been "justified" through an unspecified "initial showing" in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to foreign relations that may be taken into account—would have an immediate and deleterious impact on the Executive's conduct of diplomatic and other foreign relations. As in *CIA v. Sims*, 471 U.S. 159 (1985), there is little reason for foreign governments "to have great confidence in the ability of judges" to make the "complex political [and] historical" judgments that underlie classification decisions, since judges "have little or no background in the delicate business" of foreign diplomacy. *Id.* at 176. In particular, if foreign

governments cannot be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will, as a result, be spared the risks to their interests that may attend such exposure, they are likely to "close up like a clam," *id.* at 172, leaving the United States unable to obtain the information it so critically needs for the conduct of its foreign relations. The protection accorded confidences of the United States government by other nations may well be eroded in turn. Given the "changeable and explosive nature of contemporary international relations," *Haig*, 453 U.S. at 292, and the breach of trust that disclosure of a foreign government's confidences would occasion in foreign relations generally and in the delicate arena of international law enforcement, "the vagaries of circumstances" beyond the United States' control—and largely within the control of respondent—should not force the United States "to acquiesce" in the court of appeals' judgment and the harms it threatens to national security. *Bonner Mall*, 513 U.S. at 25; see also *Munsingwear*, 340 U.S. at 41 (vacatur necessary "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences").

* * * * *

For the foregoing reasons, the Court should vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case to that court with directions to order the vacation of the judgment of the district court and the dismissal of the case as moot.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID R. ANDREWS
Legal Adviser
Department of State

NOVEMBER 1999

APPENDIX A

[Seal Omitted]

HOME OFFICE

Judicial Co-operation Unit

50 Queen Anne's Gate, London SW1H 9AT

Switchboard: 0171 273 4000 Fax: 2496 Direct Line: 0171 273 3090

Our reference:

HONORABLE PATRICK F. KENNEDY

Assistant Secretary of State

Your reference:

U.S. Department of State

2201 C Street

Date: 23 November 1999

Washington, D.C. 20520-0001

Dear Mr. Kennedy

WEATHERHEAD V. UNITED STATES: HOME OFFICE LETTER
OF 28 JULY 1994

We are grateful to United States authorities for drawing to our attention a letter of 16 November 1994 from the British Consul in Seattle to Mr. Leslie Weatherhead, Attorney at Law, about the extradition to the United States in July 1994 of Sally Hagan and Susan Croft. Insofar as we have been able to ascertain, the Home Office and the Foreign and Commonwealth Office here in London had not seen that letter before. That letter in turn refers to the Home Office's letter of 28 July 1994, which both we and the US Government heretofore have declined to release.

2a

The UK Government does continue to attach great importance, as I know does the US Government, to according the highest measure of confidentiality to communications between our two Governments. That, of course, is the context within which primarily falls to be considered the question of disclosing the Home Office letter of 28 July 1994.

Without prejudice to that important principle, however, we have now reflected on the contents of that letter in the light of the British Consul's letter of November 1994. In view of that previous partial disclosure of the contents of the 28 July 1994 letter, the Home Secretary and the Foreign Secretary do not insist upon maintaining the confidentiality of that letter and therefore believe that an exception to the normal rule of confidentiality for such intergovernmental communications should be made.

Accordingly, we have no objection to disclosure by the United States, and under the circumstances, would ask you to furnish a copy of it to Mr. Weatherhead.

Yours sincerely,

/s/ BOB WOOD
BOB WOOD
Extradition Section

On behalf of the Secretary of State

3a

APPENDIX B

[Seal Omitted] United States Department of State

Washington, D.C. 20520

November 23, 1999

Gregory Workland, Esq.
W. 421 Riverside, Suite 317
Spokane, Washington 99201

Dear Mr. Workland:

In further reference to the referral under the Freedom of Information Act from the Department of Justice, the enclosed document originated by the British Home Office is released in its entirety.

Sincerely,

/s/ MARGARET P. GRAFELD
MARGARET P. GRAFELD
Director
Office of IRM Programs and Services

Page of Sheet, RPS/TPA Margaret P. Goshell, D.C.
 Release () Exempt () Deny ☒ Declassify
 Date 11-23-99 Reason

of inference

D 1.56 (c)

Our reference

Date

28 July 1994

EXTRADITION OF SUSAN HAGAN AND SALLY CROFT TO THE UNITED STATES

4a

For the record, and as I believe your office is already aware, there is no English equivalent to the US offence of interstate transportation of firearms which appears in the US indictment. Thus by virtue of Article XII of the UK/US Extradition Treaty Ms Hagan and Ms Cron cannot be detained or proceeded against in the United States in respect of that offence.

As you will know Ms Hagan and Ms Croft and others, including prominent members of both Houses of Parliament, have expressed fears that they will not receive a fair trial in Oregon because of the age of the alleged offence, the nature of the evidence against them (obtained, so it appears, from plea bargains), and alleged continuing prejudice against members or former members of the Rajneesh community. Ms Hagan and Ms Croft had asked the Home Secretary to seek an undertaking from the United States Government that the place of trial be moved to another, neutral, state. The Home Secretary declined to do so because the place of trial is, of course, for the US authorities to decide. However, he did undertake to pass these concerns on to the US authorities, and this letter fulfils that commitment.

Although judgement went strongly against Mrs Hagan and Ms Croft on 27 July (we shall send you a copy as soon as a transcript is available), we would wish to stress the Home Secretary's concern that questions of local prejudice are examined most carefully by all those concerned in the trial process. This case has attracted an unprecedented degree of Parliamentary, public and media attention in this country. There will inevitably continue to be a great deal of concern expressed about the case by supporters of Mrs Hagan and Ms

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Croft, both inside and outside Parliament. There are highly likely to be Parliamentary debates about it in October or November, after the summer Recess, possibly resulting in votes condemning the Home Secretary's actions. The British Consul in Seattle will be taking a close interest in the progress of the trial. But particularly in view of the almost inevitable Parliamentary debates, I would be most grateful if you would ensure that we are kept in very close touch with developments.

Yours sincerely

Alison Rutherford

ALISON RUTHERFORD

5a

UNCLASSIFIED

~~CONFIDENTIAL~~

(11)

Supreme Court, U. S.

F I L E D

DEC 1 1999

CLERK

No. 98-1904

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, AND UNITED STATES
DEPARTMENT OF STATE,

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

**RESPONDENT'S OPPOSITION TO PETITIONERS'
MOTION TO VACATE THE JUDGMENT
OF THE COURT OF APPEALS**

CHARLES J. COOPER*
ANDREW G. McBRIDE
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

**Counsel of Record*

18 p/2

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INTRODUCTION

Pursuant to Rule 21.4 and this Court's directive, respondent hereby files his response and opposition to petitioners' motion to vacate the judgment below. Respondent does not oppose the portion of petitioners' motion seeking dismissal of the case as moot.

It is undisputed that both the court of appeals and the district court had live controversies before them when they addressed the merits of this action. After seeking this Court's review, petitioners *unilaterally* rendered this action moot by declassifying the letter at issue and providing it to respondent. Petitioners now wish to use mootness both as a shield and as a sword – preventing this Court from reaching the merits, while effectively delivering them the relief they seek by vacating the judgment of the court of appeals. Having deprived the Court of a live controversy, petitioners now take the extraordinary and unprecedented position that this Court should nonetheless adopt their view of the merits and vacate the judgment below for that reason. *See* Petitioners' Motion to Vacate the Judgment of the Court of Appeals and Remand the Case with Directions to Dismiss the Case as Moot at 19-24.¹

This Court's unanimous decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), definitively precludes such a result. *Bonner Mall* rejected application of the "extraordinary remedy of vacatur," *id.* at 26, where a settlement entered into by the parties mooted the case pending this Court's review. It follows *a fortiori* that vacatur is wholly inappropriate where, as

¹ In this response, citations are to the present motion ("Pet'r Mot."), Brief of the Respondent ("Resp. Br."), Brief for the Petitioners ("Pet'r Br."), Joint Appendix ("J.A."), Appendix to the Petition for Certiorari ("Pet. App."), Respondent's Brief in Opposition to Certiorari ("Opp. Cert.") and Reply Brief for the Petitioners in Support of Certiorari ("Reply Br.).

here, the party seeking review voluntarily moots the case through an action entirely within its own control. Petitioners propose a radical expansion of the dicta in *United States v. Munsingwear*, 340 U.S. 36 (1950), effectively allowing the government to wipe from the books precedents with which it disagrees without the inconvenience of adversarial litigation on the merits in a higher court. Such an approach is unfair to the lower courts, unfair to the litigant who prevailed in the court below, and allows frequent litigants in federal court, like the United States, to manipulate our civil justice system. Because the United States has voluntarily and unilaterally mooted its own petition for certiorari through an administrative action only it can take, the only appropriate remedy is simple dismissal of the writ.

STATEMENT

This Freedom of Information Act ("FOIA") case grew directly out of respondent's representation of Sally Ann Croft, one of two British nationals extradited to face criminal charges in Oregon in connection with their activities while members of the spiritual group led by the Bhagwan Shree Rajneesh. That extradition drew very open, very public dissent from many members of the British House of Lords and the British press. See Resp. Br. at 5-6; Pet'r Br. at 23 n.19. References were specifically and repeatedly made in public debates to concern over the extreme local prejudice in Oregon against former members of the Bhagwan's cult. The letter at issue in this case, a July 28, 1994 letter from the British Home Office to the Department of Justice ("Extradition Letter"), was sent contemporaneously with the delivery of Croft and Hagan to the United States. Respondent sought the Extradition Letter for the purpose of bringing British concerns (and any American promises) regarding local prejudice and change of venue to the attention of the district court presiding over the criminal case.

On November 29, 1994, respondent filed his FOIA request with the Department of State ("State"). In that request itself, respondent recited certain details regarding the Extradition Letter. These details had been conveyed to respondent two weeks earlier in a letter from Stephen Turner, H.M. Consul, Seattle, Washington, to Leslie Weatherhead (November 16, 1994) ("Consul's Letter"), which respondent has now lodged with this Court. In his initial FOIA request, respondent wrote to State: "This will request a copy of a letter from the British home office to George Procter of the United States Department of Justice dated July 28, 1994, related to the *extradition and prosecution of Sally Croft and Susan Hagan*." J.A. 10 (emphasis added). Petitioners never disputed this characterization of the letter and, in fact, admitted it in their answer to respondent's complaint. See J.A. 38-39.

Similarly, petitioners' own affidavits before the district court acknowledged that the letter at issue contained expressions of British concerns over handling of the criminal case in the United States. Thus, the Shiels Declaration, filed in March 1996, states:

The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K extradition agreement.

Pet. App. 54a.

Thus, petitioners were aware before this FOIA litigation commenced that respondent knew the date, addressee, and general subject matter of the letter at issue. Yet, petitioners never inquired of respondent or the British Government about how respondent learned these

details about a putatively confidential and classified letter.²

Nor does the Consular Letter, as petitioners would have it, disclose "much of the substance of the letter that is the subject of this FOIA case." Pet'r Mot. at 2. In fact, the opposite is true. The Consular Letter reveals the substance of one sentence in the two-page Extradition Letter. It confirms that the letter at issue "stressed the Home Secretary's concern that questions of local prejudice were examined most carefully during the pre-trial process." Consular Letter at 1. The Consular Letter, however, does not in any way reveal any of the remaining information in the Extradition Letter; namely, that the British government refused extradition of Hagan and Croft on the firearms charges because "there is no English equivalent to the US offence of interstate transportation of firearms,"³ that many in Britain, including prominent members of both Houses of Parliament, were concerned about the fairness of a trial in Oregon "because of the age

² Present counsel for respondent was engaged on June 23, 1999, to handle the case in this Court. Counsel did not learn of the existence of the Consular Letter until after this Court's grant of certiorari on September 10, 1999.

³ Respondent pointed out to this Court in his opposition to certiorari that the British had refused to extradite Croft and Hagan on the firearms charge in the indictment due to a lack of dual criminality. Opp. Cert. at 26. Respondent further noted that this fact had been communicated to the district court in Oregon in government pleadings, *id.* at 27, and that if any information regarding "dual criminality" was in the letter at issue, there was no plausible argument for it being withheld. *Id.* & n.15. In their reply, petitioners told this Court that "a distinct surrender warrant" contained the "dual criminality" information, implying that the letter at issue in this case did not. Reply Br. at 9 & n.9. In any event, given that this information was conveyed to a federal district court, it is well nigh impossible to conceive of anything more "innocuous" or more easily segregable from other portions of the letter.

of the alleged offense [and] the nature of the evidence against them (obtained, so it appears, from plea bargains)," that the Home Secretary considered conditioning extradition on a change of venue but concluded that the place of trial is "for the US authorities to decide," and that the controversy in Britain surrounding the extradition would likely be debated in Parliament, "possibly resulting in votes condemning the Home Secretary's action." Extradition Letter at 1-2. As respondent made clear in his brief, the Consular Letter supports a limited argument for segregating and disclosing the reference in the Extradition Letter to British concerns about local prejudice. Resp. Br. at 48-49. The Consular Letter does nothing, however, to undermine the British desire for confidentiality or petitioners' "rationale" for classification as to any other portion of the letter. Petitioners have found in the lodging of the Consular Letter a convenient fig leaf to cover their withdrawal from an untenable legal position and to justify the declassification of a letter that quite obviously should never have been classified under the specific criteria of President Clinton's Executive Order. See Exec. Order No. 12,958, 3 C.F.R. § 333 (1996) ("Clinton Order").

As repeatedly pointed out in respondent's brief on the merits, neither respondent nor the Ninth Circuit questioned petitioners' representations regarding the position of the British Government. Resp. Br. at 13, 36-48. The Ninth Circuit ruled that, given the profound changes wrought by the new Clinton Order, breach of diplomatic confidentiality, standing alone, could not justify classification *as a matter of law*. Pet. App. 14a-18a. That is how petitioners themselves characterized the Ninth Circuit's ruling when seeking this Court's review. See Reply Br. at 5 ("[T]he only issue before the court of appeals was the legal question whether the harm that the declarations described – harm arising from the very act of breaching a

foreign government's legitimate expectation of confidentiality – constituted a form of harm to the national security cognizable under the Executive Order.”) (emphasis in original). Respondent defended the judgment below on those same *legal grounds* in this Court; *i.e.*, FOIA requires true de novo review and under that standard the Clinton Order cannot be read to “specifically authorize” classification based solely on a breach of general canons of diplomatic confidentiality. Resp. Br. 15-48.

The Consular Letter simply does not dispose of these issues. It supports segregation and disclosure of a single reference in the Extradition Letter, but nothing more. Resp. Br. at 48-49. That petitioners have unilaterally reexamined their own desire to honor British claims of confidentiality, after briefing to this Court, cannot undermine or affect in any way the Ninth Circuit's *legal* judgment that the harms petitioners identified below are not “cognizable” under the Clinton Order. If anything, the record below *avored* petitioners – the case was litigated on the premise that the British requested complete confidentiality. Thus, petitioners' claim that the decision below was litigated “‘upon a record improperly made up,’” Pet'r Mot. at 14 (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936)), is specious. Petitioners' legal change of heart in this Court should be treated no differently than a decision not to seek review in the first place.

ARGUMENT

On November 23, 1999, petitioners declassified and disclosed the Extradition Letter, thereby rendering this case moot. Thus, petitioners are not entitled to the *Mun-singwear* remedy under any interpretation of that doctrine or any precedent of this Court. Apparently recognizing this fact, petitioners now seek to hold *respondent* somehow responsible for the decision to declassify – a decision that is, by executive order, committed to a limited group of Executive Branch officials. Even if petitioners could

somehow demonstrate that respondent participated in the decision to declassify, respondent's participation would have to *exceed* that of petitioners for this Court to even consider vacating the judgment below. *Bonner Mall*, 513 U.S. at 26.

This Court should firmly reject petitioners' attempt to cast a unilateral decision of the Executive Branch to declassify and disclose the letter at issue in this case as the responsibility of either respondent or the British Government. It was the responsibility of petitioners, exercising their “paramount authority in the area of foreign relations,” Pet'r Br. at 16, to accurately ascertain the position of the British Government in this matter and accurately convey that position to the federal courts. Respondent quite naturally assumed that the British Government was aware of an official communication of one of its consular officers and that the British had made petitioners similarly aware. Petitioners undertook no discovery from respondent in this case. Instead, senior officials in the State Department filed declarations under oath attesting to the absolute, unwavering British desire that the entirety of the letter at issue remain confidential. Petitioners' own failure to carefully examine the premises of their own classification decision – and their tardy reexamination of that decision – cannot entitle them to the extraordinary remedy of vacatur.

It was petitioners' unilateral act of declassification, not respondent's lodging of the Consular Letter, that rendered this controversy moot. Petitioners' position throughout this litigation has been that the British expectation of confidentiality arose at the time the letter was sent to the United States. *See* Shiels Declaration ¶ 13; Pet. App. 52a; Kennedy Declaration ¶ 9; Pet. App. 58a-59a. Moreover, petitioners have maintained that the content of the letter is irrelevant. *See* Kennedy Declaration ¶ 4; Pet. App. 56a. That the British chose to reveal to respondent a single reference in the Extradition Letter does not bear upon the British expectation of confidentiality as to the

rest of the letter – including the most provocative parts of the letter discussing possible Parliamentary action against the Home Secretary. Respondent's lodging of the Consular Letter simply cannot explain petitioners' wholesale abandonment of their legal position before this Court.⁴

Try as they may, petitioners cannot avoid the simple, legal certainty that the decision to declassify a document rests entirely within their control. In their opening brief, petitioners emphasized the Executive's exclusive role in foreign affairs and his "authority to withhold information about foreign affairs and diplomatic negotiations even from Congress." Pet'r Br. at 17. Petitioners now seem to claim that either respondent, through his lodging of the Consular Letter with this Court, or the British Government, through their response to State's inquiry, have somehow divested the Executive of his previously plenary authority over foreign affairs and national security. But it is petitioners themselves, through their interpretation of the Clinton Order, who have decided what weight, if any, to give the British position in their classification and declassification decisions. None of petitioners' implausible contentions can obscure the fact that in the

⁴ Indeed, the United States litigates FOIA cases where some or all of the information at issue has been disclosed to the public from other sources. In these cases, the United States maintains that despite the disclosure from one source, acknowledgement by the United States that it received the information from a particular source at a particular time, would itself cause harm. See, e.g., *Fitzgibbon v. CIA*, 911 F.2d 755, 765-66 (D.C. Cir. 1990); *Afshar v. Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983). Petitioners obviously made a conscious and voluntary choice not to take this position as to the one sentence of the Extradition Letter disclosed by the Consular Letter. As to the rest of the Extradition Letter, petitioners' arguments for non-disclosure were unaffected by the release of one sentence in another document. See *Public Citizen v. Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993); *Afshar*, 702 F.2d at 1129, 1131-32.

end, an officer of the State Department, a party petitioner in this case, has declassified the letter at issue and thereby mooted his own case. Under the Clinton Order, neither respondent nor the British Government are "Declassification authorit[ies]," entitled to take such a step. Clinton Order § 3.1(c); Pet. App. 80a.

This Court's unanimous decision in *Bonner Mall* is controlling in this case and requires denial of petitioners' motion to vacate. In *Bonner Mall*, this Court granted certiorari to review a point of bankruptcy law that had divided the lower courts. The case became moot when the parties entered into a settlement that was approved by the bankruptcy court. Much like petitioners here, the petitioner in *Bonner Mall* asked this Court to vacate the decision below, relying upon dicta in *United States v. Munsingwear* to the effect that vacatur of the decision below is the "established practice" where a case becomes moot on appeal. *Bonner Mall*, 513 U.S. at 23 (citing *Munsingwear*, 340 U.S. at 39). The government filed an amicus brief in *Bonner Mall* supporting the petitioner's broad view of *Munsingwear*. See Brief for the United States as Amicus Curiae in No. 93-714 (filed May 12, 1994).

This Court refused to give an expansive reading to the *Munsingwear* dicta and instead undertook to reexamine the theoretical underpinnings of the practice of vacatur.⁵ The Court found that one of the central considerations governing availability of the remedy is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Bonner Mall*, 513 U.S. at 24 (citations omitted). The Court drew a clear line between unilateral actions of the respondent and "happenstance" on the one hand, both of which are beyond a petitioner's control, and those cases where petitioner takes some voluntary action to moot his own case, on the

⁵ Petitioners' motion for vacatur in this case relies upon the *Munsingwear* dicta as if *Bonner Mall* were never decided. See Pet'r Mot. at 12-13.

other. In *Bonner Mall* itself, even respondent's participation in the settlement did not alter the analysis:

That the parties are jointly responsible for settling may in some sense put them on even footing, but petitioner's case needs more than that. Respondent won below. It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur. *Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.*

Id. at 26 (emphasis added). The Court also noted serious institutional concerns with a rule that would allow a petitioner to participate in mooting the case and then nonetheless erase the decision below. "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system." *Id.* at 27.

Bonner Mall dictates denial of petitioners' motion to vacate the judgment below in this case. Unlike a settlement, petitioners' decision to declassify is by law a unilateral one – neither respondent nor the British Government have any right to participation in that decision. Petitioners' decision to declassify, even if influenced by respondent's lodging of the Consular Letter, is still, in the end, petitioners' decision. Like the decision to settle in *Bonner Mall*, petitioners' voluntary involvement in mooting the case precludes petitioners from carrying their burden of justifying extraordinary equitable relief. *Accord Karcher v. May*, 484 U.S. 72, 83 (1987) (denying vacatur because "[t]his controversy did not become moot

due to circumstances unattributable to any of the parties"). Moreover, the same institutional concerns identified by the Court in *Bonner Mall* are present here. If vacatur is granted, petitioners gain a "merits victory" by their own hand without a full hearing for respondent in this Court. Such a precedent could become a weapon to "reverse by mootness" any FOIA or Administrative Procedure Act precedents with which the government disagrees.

Petitioners' reliance upon this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), is sorely misplaced. In that case, Maria-Kelly F. Yniguez, an Arizona state employee, brought a First Amendment challenge to Article XXVIII of the Arizona Constitution, which she claimed operated to prohibit her from using any language other than English in her communication with the public as a state official. Yniguez sought injunctive relief prohibiting Arizona authorities from enforcing the provision against her. The Arizona Attorney General issued an opinion to the effect that the English-only provision applied only to "official acts of government," *id.* at 52 (citation omitted), and did not prohibit state employees, like Yniguez, from using other languages to provide effective service to the public. Despite this opinion, and despite the pendency of a similar case before the Arizona Supreme Court, both the district court and the court of appeals interpreted Article XXVIII to work a sweeping ban on the use of any foreign language by all state employees. *Id.* at 54, 61-62. Both courts refused to certify the question of the proper interpretation of the provision to the Arizona Supreme Court, as repeatedly requested by the Arizona Attorney General. *Id.* at 76-77.

The day after notices of appeal were filed, and the day before the appeal was formally docketed, Yniguez voluntarily resigned her position as a state employee to undertake a position in the private sector. *Id.* at 59-60, 68 n.23. Despite the obvious implications of Yniguez's resignation to the presence of a live case or controversy,

Yniguez's counsel failed to bring her resignation to the attention of the court of appeals. *Id.* at 68-69 & n.23. Eventually, the Arizona Attorney General brought the resignation to the court of appeals' attention in a suggestion of mootness. *Id.* The court of appeals found a live controversy by construing Yniguez's complaint as seeking nominal damages as well as prospective relief.

Under these circumstances, the Supreme Court found that the extraordinary remedy of vacatur of the lower courts' merits determinations was appropriate. Three considerations were paramount. First, Yniguez, respondent in this Court, had unilaterally taken a voluntary action that mooted the controversy. "Yniguez's changed circumstances - her resignation from public sector employment to pursue work in the private sector - mooted the case stated in her complaint." *Id.* at 72 (citing *Boyle v. Landry*, 401 U.S. 77, 78 (1971)). Second, because that resignation occurred prior to disposition of the appeal, there was no live controversy before the court of appeals, which should have dismissed the appeal upon learning of Yniguez's resignation. *Id.* at 73. Finally, this Court was troubled by the failure of the lower courts to make use of the procedural device of certification to the Arizona Supreme Court. Certification of a novel state law question in these circumstances was consonant both with federalism concerns and a federal court's duty to avoid constitutional adjudication if possible. *Id.* at 76-81. Because a definitive interpretation of Article XXVIII of the Arizona Constitution from the Arizona Supreme Court might have eliminated the need to address the federal constitutional question, the lower courts erred in not pursuing this procedural route prior to reaching the First Amendment issue. *Id.*

None of the three factors central to the Court's decision to vacate in *Arizonans for English* is present here. First, respondent did not, indeed could not, moot his own complaint. Petitioners cannot plausibly maintain that respondent's lodging of the Consular Letter, like

Yniguez's resignation, itself mooted this case. If that were true, petitioners should have moved to dismiss the case as moot *without declassifying the Extradition Letter and providing it to him*. The Consular Letter revealed only a small portion of the Extradition Letter and revealed it through a source other than petitioners. Respondent's complaint sought disclosure of the full Extradition Letter by agencies of the United States pursuant to the FOIA. Only the United States could moot respondent's complaint by voluntarily taking the very action the complaint sought to compel.

Second, unlike *Arizonans for English*, this case was not moot prior to its adjudication in the court of appeals. The case became moot on November 23, 1999, when petitioners declassified the Extradition Letter and provided it to respondent. Thus, unlike *Arizonans for English*, there is no "defect" in the lower court's jurisdiction to "notice." *Id.* at 73 (citing *United States v. Corrick*, 298 U.S. 435, 440 (1936)) (further citations omitted).

Third, there is no procedural defect in the proceedings below, like the failure to certify in *Arizonans for English*, that would justify the extraordinary remedy of vacatur. Nor did the Ninth Circuit purport to pass on any momentous issues of constitutional import. It simply held that President Clinton's new executive order, consciously adopted to increase disclosure and avoid presumptive classification, did not "specifically authorize" the classification of this one letter. The government's disclosure of the letter serves to confirm this judgment. It is wholly innocuous, has clearly segregable portions, and plainly should not have been classified in the first place. The rapid British abandonment of confidentiality concerns about the *whole* letter, based on the prior disclosure of the letter's single reference to local prejudice, certainly undermines petitioners' apocalyptic representations of

diplomatic harm from disclosure made to both the courts below and this Court.⁶

Finally, this Court should definitively reject the government's extraordinary suggestion that, despite the absence of a live controversy, this Court should "peek" at the merits, adopt petitioners' legal analysis, and vacate the judgment below on those grounds. *See* Pet'r Mot. at 18-24. Neither *Arizonans for English* nor any other case of this Court endorses such an unconstitutional and unfair procedure. As this Court emphasized in *Bonner Mall*, "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review." *Bonner Mall*, 513 U.S. at 21 (citations omitted). Ancillary jurisdiction exists pursuant to 28 U.S.C. § 2106 to issue such orders as necessary to dispose of the case as justice may require, without reference to the merits of the action. "If a judgment has become moot, this Court *may not consider its merits*, but may make such disposition of the whole case as justice may require." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944) (emphasis added).

Arizonans for English is not to the contrary. While finding fault with the *procedural* handling of the case by

⁶ Nor can the British change of heart provide petitioners with a rationale for mootness independent of their own actions. Only the United States government's action in declassifying and disclosing the letter could moot respondent's FOIA complaint. Petitioners simply cannot maintain the claim that the declassification of this letter is some event external to their own control. *Compare United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466 (1916) (outbreak of World War I rendered anti-trust action against British and German shipping lines moot, vacatur granted). In any event, while petitioners have filed the British letter assenting to disclosure with the Court, they have not recounted their own written and oral communications to the British prior to receiving that letter.

the lower courts, this Court was careful to "express no view on the correct interpretation of Article XXVIII or on that measure's constitutionality." 520 U.S. at 49. Because it found the case moot, the Court emphasized that it would address only questions going "to the Article III jurisdiction of this Court and the courts below, *not to the merits of the case.*" *Id.* at 67 (citing *Bonner Mall*, 513 U.S. at 20-22) (emphasis added). Petitioners' suggested "peek at the merits" in a moot case violates Article III, is patently unfair, and is definitively prohibited by the decisions of this Court.

In sum, there was a live controversy before the district court and the court of appeals. The court of appeals resolved that controversy in respondent's favor based on the legal conclusion that the Clinton Order did not contemplate classification in these circumstances. Petitioners have now mooted the case by taking an administrative action committed to them alone by law. Vacating the judgment below in these circumstances is contrary to an orderly system of justice and would allow petitioners to reverse the lower court judgment by their own hand. This Court's precedents firmly reject such a result.

CONCLUSION

Petitioners' motion to vacate the judgment below should be denied. The writ of certiorari should be dismissed as moot.

Respectfully submitted,

CHARLE J. COOPER*

ANDREW G. MCBRIDE

COOPER, CARVIN & ROSENTHAL, PLLC
Suite 200

1500 K Street, N.W.

Washington, D.C. 20005

(202) 220-9600

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*Counsel of Record

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In the
Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT
OF JUSTICE, AND UNITED STATES DEPARTMENT OF STATE,
Petitioners,

v.

LESLIE R. WEATHERHEAD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND THE SOCIETY OF
PROFESSIONAL JOURNALISTS IN SUPPORT OF
RESPONDENT

GREGG P. LESLIE
*Counsel of Record
for Amici Curiae*
GREGORY H. KAHN
The Reporters Committee for
Freedom of the Press
1815 N. Fort Myer Dr., Suite 900
Arlington, Virginia 22209
(703) 807-2100

(additional counsel for amici listed on inside cover)

BEST AVAILABLE COPY

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ADDITIONAL COUNSEL FOR AMICI:

Counsel for Society of Professional Journalists:

BRUCE W. SANFORD

ROBERT D. LYSTAD

BRUCE D. BROWN

Baker & Hostetler LLP

1050 Connecticut Avenue NW

Suite 1100

Washington, D.C. 20036

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INTEREST OF AMICI CURIAE¹

Respondent Leslie Weatherhead is not a journalist, but the plight of his Freedom of Information Act request will

¹ Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

affect the ability of the media to inform the public about the federal government's actions.

The media have used FOIA for the last thirty-three years to access government information. The media have then reported on their findings to the public, a large percentage of which relies on them to expend time and resources uncovering information that would otherwise not be easily accessible. One essential area of reporting is in uncovering and explaining findings about foreign affairs.

The media have a strong interest in the proper resolution of this case. The government argues that executive agencies can unilaterally exempt categories of documents from FOIA and the declassification criteria promulgated in the current executive order on declassification. If the Court accepts the government's argument, it will have disregarded the plain language of a statute and an executive order and ignored the public policies underlying those enactments.

The Reporters Committee for Freedom of the Press serves as a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

SUMMARY OF ARGUMENT

This case does not involve a private citizen or entity attempting to get information about other private citizens or entities. It does not involve an effort by someone to get hundreds of thousands of dollars worth of information from the government. Instead, this case involves the efforts of a defense attorney to get a single letter from the British government concerning his client's extradition from Great Britain.

But on a broader plane, this case raises the question of how much leeway Congress has given the executive branch to withhold information ostensibly to protect "national security." Congress undoubtedly has given the executive branch the ability to set the criteria under which agencies withhold information based on the national security exemption. But Congress has never set aside the government's mandate of openness as expressed in the Freedom of Information Act. Information can be withheld only if it meets predetermined criteria set out in an executive order.

Congress passed FOIA in 1966 to ensure that the American public would be informed about its federal government and substantially amended the Act in 1974 to make it stronger. FOIA starts with the assumption that federal government information is subject to disclosure and mandates *de novo* judicial review when a person or entity requesting information complains that a federal agency improperly denied the request. Congress set out only nine categories of information that can be exempted from disclosure. Information can fall within an exemption only if it meets specific, enumerated criteria.

FOIA's first exemption allows withholding to protect national security. Exemption 1 — as amended by Congress in

1974 — gives the responsibility to the President of the United States to determine the criteria under which information can be withheld to protect national security.

Therefore, under FOIA's statutory scheme, when a FOIA requestor seeks information, an agency can only claim the national security exemption after it reviews the currently-applicable executive order and determines that the requested information meets the criteria for nondisclosure as established by the President. And if the FOIA request is denied, the requesting party is entitled to *de novo* judicial review in federal court.

In 1995, President Clinton signed an executive order that dramatically changed the criteria under which Exemption 1 decisions can be made by federal agencies. Most importantly for this case, it requires the government to identify and describe the damage to national security that would result from the release of requested information before an agency can withhold it as classified. The executive order also left no room for an agency to withhold an entire category of information.

This is not a case where the executive branch seeks assistance from this Court in interpreting a congressional statute. Instead, it is a case where the executive branch seeks permission from the judicial branch to ignore the plain language of congressional legislation and an executive order signed by the sitting President.

ARGUMENT

I. FOIA gives the public a right to access federal government information with only narrow exceptions.

Congress enacted FOIA in 1966 after eleven years of investigation and deliberation.² In enacting FOIA, Congress intended to establish "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). FOIA replaced a statute "plagued with vague phrases" that gave agencies essentially unlimited discretion to withhold information.³ The law mandates disclosure subject only to specific, delineated objections.⁴

²See Harold C. Relyea, *The Evolution of Government Information Security Classification Policy: A Brief Overview (1972-1992)* (Cong. Res. Serv., Washington, D.C.), Dec. 1, 1992, at 46-47; see also Daniel Patrick Moynihan, *Secrecy: A Brief Account of the American Experience*, in SECREC A-60 (Comm. on Protecting and Reducing Govt. Secrecy 1997).

³*EPA v. Mink*, 410 U.S. 73, 79 (1973) (discussing § 3 of the Administrative Procedure Act of 1946, 60 Stat. 237, 238, codified at 5 U.S.C. § 1002 (1964)); see also S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

⁴See *Rose*, 425 U.S. at 361 ("To make crystal clear the congressional objective . . . Congress provided . . . that nothing in the Act should be read to 'authorize withholding of information . . . except as specifically stated . . .'" (citing Freedom of Information Act § (d), (continued...))

II. Congress gave the President the power to set Exemption 1 criteria.

Here, the government is attempting to subvert both the plain language and underlying policy objectives of the legislative scheme.

Exemption 1 states that FOIA does not apply to matters that are

(1)(A) specifically authorized *under criteria established by an Executive order* to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b)(1) (emphasis added). In drafting Exemption 1, Congress specifically gave the executive branch the power to set the *standards* for protecting information that could harm national security, but it did not cede its legislative mandate that only narrow, specific categories of information are exempt from the broad range of FOIA.

Congress created a statutory scheme under which the exemption to disclosure of documents for national defense or foreign policy must be made under guidelines established by the executive branch, and any complaints that federal agencies are not abiding by the criteria that the executive branch established must be considered *de novo* by the judicial branch.

Under this statutory scheme, Presidents Carter, Reagan,

⁴(...continued)

5 U.S.C. § 552(d) (1994 & Supp. IV 1998).

and Clinton have all signed executive orders since the 1974 FOIA amendments concerning the criteria that agencies should use in determining whether they should classify information. See Exec. Order No. 12,065, 3 C.F.R. 190 (1979); Exec. Order No. 12,356, 3 C.F.R. 166 (1983); Exec. Order No. 12,958, 3 C.F.R. 333 (1995).

III. President Clinton's classification executive order dramatically changed the criteria for national security exemptions to FOIA.

From 1982 until 1995, President Reagan's Executive Order 12,356 allowed federal agencies to withhold enormous amounts of information under Exemption 1. See Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (hereinafter "Reagan Order"). The outcry from the effect that the Reagan Order had on FOIA requests was a factor in leading President Clinton to dramatically alter the criteria in 1995.

The Reagan Order established a presumption in favor of classification when any doubt about the status of information existed. Reagan Order 1.1(c). It significantly eased the ability of agencies to classify information. Reagan Order 1.1(c). It provided that "[u]nauthorized disclosure of foreign government information . . . is presumed to cause damage to the national security," while broadly defining "foreign government information" as including "information provided by a foreign government . . . with the expectation, express or implied, that the information, the source of the information, or both, are to be held in confidence." Reagan Order 1.3(c), 6.1(d)(i). It also allowed an agency to classify documents without delineating any identifiable damage that would result from disclosure and allowed exemption whenever a classifier

determined that the information "either by itself or in the context of other information" could damage the national security. Reagan Order 1.3(b).

Under the criteria of the Reagan Order, it was easy to presume that correspondence sent from a foreign government to the United States government should not be disclosed if the foreign government had either expressly or impliedly indicated that the information or the source of the information should be held in confidence.

The Reagan order led to ringing complaints about the state of FOIA requests for national defense or foreign policy matters. For example, some reporters referred to the statute's name of "Freedom of Information Act" as an "oxymoron" under the Reagan Order, and a 1992 panel of media experts listed the federal government's refusal to disclose requested documents as one of the most important stories of the year. See Chris Norris and Peter Tira, *The Press Passes*, S.F. BAY GUARDIAN, Jan. 22, 1992; Peter Montgomery and Peter Overby, *The Fight to Know*, COMMON CAUSE MAG., July/Aug. 1991.

Following the 1992 Presidential campaign, President Clinton issued a directive creating an interagency task force responsible for "drafting a new executive order that reflects the need to classify and safeguard national security information in the post Cold War period." Presidential Review Directive 29 (April 26, 1993). He then disseminated an October 1993 memorandum calling upon federal agencies to reaffirm their commitment to the Freedom of Information Act: "Openness in government is essential to accountability and the Act has become an integral part of that process." President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29

WEEKLY COMP. PRESS DOC. 1999 (Oct. 4, 1993), *quoted in* Office of Information and Privacy, U.S. Dept. of Justice, *Freedom of Information Act Guide & Privacy Act Overview* 3 (Sept. 1998 ed.).

In fact, the view that the government should classify fewer documents and should declassify documents that had been originally classified was not unique to the new administration. It had been expressed by people inside and outside of the government for years. Former solicitor general Edwin Griswold, who served during the Nixon administration, acknowledged the problem of over-classification:

It quickly becomes apparent to any person who has considerable experience with classified material that there is a massive over-classification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis of short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience, and it may be relevant now.

Edwin N. Griswold, "Secrets Not Worth Keeping," *Washington Post*, Feb. 15, 1989, at A25; see also Daniel Patrick Moynihan, *Secrecy: A Brief Account of the American Experience*, in *SECRECY A-63* (Comm. on Protecting and Reducing Govt. Secrecy 1997).

By fiscal year 1993, federal agencies had conducted 6.3 million "classified actions" in one year, declassification

activity had decreased by 30 percent, and the National Archives and Records Administration alone had more than 325 million pages of classified documents. See Steven Aftergood, *SECRECY & GOVT. BULLETIN* (June 1994) (quoting the 1993 Information Security Oversight Office's Report to the President and Jeanne Schauble of the National Archives and Records Administration). The House Appropriations Defense Subcommittee wrote to President Clinton that his administration should "produce a comprehensive post-Cold War reform plan that addresses the current problem of over-classification, which exacts excessive costs both in dollars and in the ability of a democratic society to operate," and even the men and women doing the classification complained in a 1992 statement that the public "trust has been violated too many times" because classification decisions had not been made "in the best interest of the nation and the people." David C. Morrison, *For Whose Eyes Only?*, NAT. JOUR., Feb. 26, 1994, at 473 (quoting the House Appropriations Defense Subcommittee and the National Classification Management Society). The task force held public hearings, gathering many views that too much information was too easily classified. For instance, Robert D. Steele, a former Marine intelligence officer, told the task force that "[a]ny executive order promulgated in the future should begin with the premise that information, including intelligence, is the most useful when widely disseminated." David C. Morrison, *For Whose Eyes Only?*, NAT. JOUR., Feb. 26, 1994, at 474.

As the task force drafted the executive order, it stated that one of the "Major Changes" should be that the executive order "[e]liminates the presumption that any category of information is automatically classified." Presidential Review Directive 29 Task Force, Information Security Oversight

Office (documents pertaining to draft dated August 31, 1993).

In April 1995, President Clinton signed Executive Order 12,958, which fundamentally altered the classification landscape in favor of disclosure by making reliance on Exemption 1 much more difficult for federal agencies. See Exec. Order No. 12,958, 3 C.F.R. 333 (1995) (hereinafter "Clinton Order"). In signing the Order, President Clinton explained that one of his express motivations was to "keep a great many future documents from ever being classified":

... [This order] will sharply reduce the permitted level of secrecy within our Government, making available to the American people and posterity most documents of permanent historical value that were maintained in secrecy until now.

....

... [W]e will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the classification unclassified. We will not permit the reclassification of information after it has been declassified and disclosed under proper authority. We will authorize agency heads to balance the public interest in disclosure against the national security interest in making declassification decisions. And, *we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.*

Taken together, these reforms will greatly reduce the amount of information that we classify in the first place and the amount that remains classified.

Statement on Signing the Executive Order on Classified National Security Information, 31 WEEKLY COMP. PRESS DOC. 633 (April 17, 1995) (emphasis added). The accompanying Clinton Order laid out new criteria for classification:

Sec. 1.2. Classification Standards. (a) Information may be originally classified under the terms of this order only if *all* of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.5 of this order; and

(4) *the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.*

Clinton Order 1.2(a) (emphasis added). "Damage to the national security" was defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." Clinton Order 1.1(l). The Executive Order also eliminated any presumption that categories of information are automatically exempt from disclosure and instead stated that agencies should presume that documents are subject to disclosure. See Clinton Order Preamble, 1.2(b). It provided that all doubts

about whether a document can be disclosed must be resolved in favor of disclosure. See Clinton Order 1.2(b).

Under the criteria in the Clinton Order, government-to-government correspondence must be disclosed to a requesting party unless (a) release of the information would damage the national defense or foreign relations of the United States and (b) the agency seeking not to disclose the information can identify and describe the harm resulting from the disclosure of that information.

The Clinton Order reversed the tide of continued over-classification. During the first three years of the Clinton Order's implementation, federal agencies declassified 131 percent more pages than during the previous sixteen years combined. See Information Security Oversight Office's 1998 Report to the President (August 31, 1999).

In sum, the Clinton Order was intended to remedy the growing problem of over-classification, and the plain language of the order makes that objective clear.

IV. The government's proposed reading of Exemption 1 allows it to ignore the plain language of FOIA and the Clinton Order.

In its brief, the government takes the extraordinary position that the Court should ignore the plain language of FOIA and the plain language of the Clinton Order and instead allow the executive branch of the government the unfettered ability to create new categories of exemptions for areas such as "exchanges between governments." Petitioner's Brief at 7-8 (citing Declaration of Peter M. Sheils, Acting Information and Privacy Coordinator and Acting Director of Office of

Freedom of Information, Privacy, and Classification Review for the Department of State, *Weatherhead v. U.S.A.*, No. 95-0519-FVS, E.D. Wash. (March 5, 1996) (arguing in favor of exempting "exchanges between governments" after the British Foreign and Commonwealth Office, through the British Embassy in Washington, stated about the letter withheld in this case that it was "unable to agree to its release")). The government points to neither FOIA nor the Clinton Order to justify its decision; instead, it makes conclusory statements about custom and practice:

It is a longstanding custom and accepted practice to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. . . . Diplomatic confidentiality obtains even between governments that are hostile to each other and even with respect to information that may appear to be innocuous.

Declaration of Patrick F. Kennedy, Assistant Secretary of Administration for the Department of State, *Weatherhead v. Department of Justice*, No. 95-0519-FVS, E.D. Wash. (April 11, 1996).

Three years after the initial determination, and only after the case was pending at the court of appeals, Acting Secretary of State Strobe Talbott filed a further declaration stating that the communication should be presumptively declared classified under a rationale that could exempt from disclosure all communications from all foreign governments. Declaration of Strobe Talbott, Acting Secretary of State, *Weatherhead v. U.S.A.*, No. 96-36260, 9th Cir. (March 2, 1999). The Clinton Order itself — drafted by members of the executive branch and signed by the chief executive — set the criteria that the

executive branch now seeks to avoid.

The government also complains in its brief that the judicial branch of the government should not interfere with the unilateral FOIA decisions of the executive branch. Petitioner's Brief at 17-35. But it is the executive branch that refuses to show any deference to the separation of powers. FOIA is a legislative act. It contains specific language mandating that the judicial branch must review FOIA complaints on a *de novo* basis. In essence, the executive branch is requesting that the judicial branch refuse to comply with a framework created by the legislative branch. It does so even though Congress deferred to the executive branch the task of setting criteria for classification, demanding only that it actually set those criteria out in an executive order.

Finally, the government also cites Exemption 1 cases that interpret executive orders that preceded the Clinton Order. Petitioner's Brief at 47-48 (citing, among other cases, *CIA v. Sims*, 471 U.S. 159 (1985), and *Haig v. Agee*, 453 U.S. 280 (1981)). Citation to those cases is inapposite. As explained above, the Clinton Order changed the criteria by which the classifying agency — and the federal district court in its *de novo* review — must evaluate the request.

The government's argument in this case that it should be allowed to exempt broad categories of information from FOIA is reminiscent of its similar argument that it made to the Court in *Department of Justice v. Landano*, 508 U.S. 165 (1993). There, the government requested that this Court make new law under FOIA Exemption 7(D) by endorsing an unwritten "universal" presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources under FOIA. This Court unani-

mously declined that request, using a rationale instructive for this case:

. . . Considerations of 'fairness' . . . counsel against the Government's rule. The Government acknowledges that its proposed presumption, though rebuttable in theory, is in practice all but irrebuttable. Once the FBI asserts that information was provided by a confidential source during a criminal investigation, the requester — who has no knowledge about the particular source or the information being withheld — very rarely will be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality.

....

. . . Congress did not expressly create a blanket exemption for the FBI; the language that it adopted requires every agency to establish that a confidential source furnished the information sought to be withheld under Exemption 7(D). The Government cites testimony presented to Congress prior to passage of the 1986 amendment emphasizing that the threat of public exposure under FOIA deters potential sources from cooperating with the Bureau in criminal investigations. But none of the changes made to Exemption 7(D) in 1986 squarely addressed the question presented here. In short, the Government offers no persuasive evidence that Congress intended for the Bureau to be able to satisfy its burden in every instance simply by asserting that a source communicated with the Bureau during the course of a criminal

investigation. *Had Congress meant to create such a rule, it could have done so much more clearly.*

Department of Justice v. Landano, 508 U.S. 165, 176-79 (1993) (citations omitted) (emphasis added).

Here, for the government's arguments to succeed, Congress would have needed to amend the explicit language of FOIA and President Clinton would have needed to issue a new executive order. Neither of those events have taken place.

CONCLUSION

The plain language of Executive Order 12,958 sets out criteria that aid in the retrieval of information concerning United States foreign relations. But the Department of Justice's tortured reading of the Clinton Order would reinstitute the barriers to the disclosure of foreign relations information that existed before 1995. Such a dramatic change in policy can — according to the terms of FOIA — only be implemented via executive order, not judicial fiat. In other words, the government would need to persuade the President — and not this Court — to change the language of the executive order to apply to future requests for foreign government correspondence.

The government has requested that this Court contravene the public's interest in ensuring that the judiciary respect Congress's plain language contained in FOIA and the executive branch's plain language used in Executive Order 12,958. This Court should deny the government's request.

Respectfully submitted,

Gregg P. Leslie

Counsel of Record for

Amici Curiae

Gregory H. Kahn

THE REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1815 N. Fort Myer Drive, Suite 900

Arlington, Virginia 22209

November 19, 1999

Of Counsel:

Bruce W. Sanford

Robert D. Lystad

Bruce D. Brown

SOCIETY OF PROFESSIONAL JOURNALISTS

Baker & Hostetler LLP

1050 Connecticut Avenue NW

Suite 1100

Washington, D.C. 20036

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In the Supreme Court of the United States

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UNITED STATES DEPARTMENT OF STATE,
Petitioners,

v.

LESLIE R. WEATHERHEAD,
Respondent.

*On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit*

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS
AMICUS CURIAE IN SUPPORT OF THE
RESPONDENT**

ELEANOR H. SMITH
Counsel of Record
CHRISTINE M. LEE
ZUCKERMAN, SPAEDER,
GOLDSTEIN, TAYLOR
& KOLKER, L.L.P.
1201 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 778-1800

LISA B. KEMLER
NATIONAL
ASSOCIATION OF
CRIMINAL
DEFENSE LAWYERS
108 North Alfred St.
Alexandria, VA 22314
(703) 684-8000

*Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers*

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QUESTION PRESENTED

Must the Government prove to the Court that it has satisfied the requirements of the Executive order relied upon to invoke Exemption 1 to the Freedom of Information Act, which specifically requires that information withheld thereunder be "in fact properly classified pursuant to [the applicable] Executive order," or is an Exemption 1 claim by the Government beyond judicial review absent an explanation for the claim that is "implausible (even after giving it utmost deference)"?

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BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS
AMICUS CURIAE IN SUPPORT OF THE
RESPONDENT

INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. Founded in 1958, the NACDL is dedicated to advancing and disseminating knowledge regarding criminal law and practice, to promoting

¹ The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court as required by Supreme Court Rule 37. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel, contributed money or services to the preparation or submission of this brief.

research in the field of criminal law and furthering the integrity, independence and expertise of criminal defense lawyers. To advance these objectives, the NACDL has appeared before this Court regularly as an *amicus*. See, e.g., *Strickler v. Greene*, 119 S. Ct. 1936 (1999); *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999); *Lilly v. Virginia*, 119 S. Ct. 1887 (1999); *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990).

The NACDL's objectives include ensuring the proper administration of justice and ensuring that federal statutes, including the open government laws, are construed and applied properly. The NACDL has used and instructed others on the use of the Freedom of Information Act ("FOIA") and has litigated cases under FOIA including *Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. Dep't of Justice*, 182 F.3d 981 (D.C. Cir. 1999) (exposing major problems in the FBI crime laboratory).

The NACDL has an interest in this FOIA case because the Court's resolution of it will affect the access of criminal defendants and their lawyers to all types of law enforcement-related records that involve or reflect communication between the United States and a foreign government. Records from foreign governments play an ever increasing role in United States law enforcement because of globalization. These records provide critical assistance to defense lawyers seeking to understand and fairly defend criminal prosecutions.

Respondent and the NACDL do not seek access to records received from a foreign government which are shielded from release by Exemption 7 to the FOIA.²

² Exemption 7 provides that the FOIA does not apply to matters that are:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a

Importantly, the Government has never invoked Exemption 7 in this case. Instead, the Government invokes Exemption 1, which protects from disclosure records whose production would harm national security. The Government also asks that the Court create a new standard of judicial review, not provided for by the FOIA, to sustain its Exemption 1 claim. The Court should not grant the Government's request for unfettered use of Exemption 1 simply because Exemption 7 is not available and the law enforcement material requested involves communication with a foreign government.

The NACDL asks the Court to rule in favor of Respondent Weatherhead's position and affirm the decision of the United States Court of Appeals for the Ninth Circuit that the Government has not carried its burden of proof under Executive Order 12,958 and therefore may not rely upon FOIA's Exemption 1 here to withhold information from the public.

fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or safety or physical safety of any individual.

5 U.S.C. § 552(b)(7).

STATEMENT OF THE CASE

This is a case of statutory interpretation. The issue is whether the Freedom of Information Act ("FOIA") requires independent judicial review of the Government's compliance with Executive Order 12,958 where the Government relies on FOIA's Exemption 1 to withhold a letter from the public. Exemption 1 protects from public disclosure only those matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 12,958 controls the Government's application of Exemption 1, and explicitly requires the Government to identify or describe the damage to national security that reasonably could be expected to occur from the disclosure. The Court of Appeals ruled that the Government's affidavits in this case contain only conclusory statements that disclosure of the extradition letter at issue could harm national security by breaching the trust between the United States and the United Kingdom. The Court of Appeals correctly exercised its authority under Section (a)(4) of the FOIA to review *de novo* the Government's affidavits and the letter and concluded that the Government had failed to articulate the harm to national security required to satisfy Executive Order 12,958 and thus Exemption 1 to the FOIA. *Weatherhead v. United States*, 157 F.3d 735 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 34 (1999).

The parties to this action agree that Congress requires *de novo* judicial review of Government exemption claims under the FOIA, including Exemption 1 national security claims. In this regard, the parties also agree that Congress requires the Government to prove that its Exemption 1 claim is proper and authorizes *in camera* review of the record in question to facilitate *de novo* judicial review. Indeed, FOIA is unequivocal on these points. Section (a)(4)(B) of the FOIA provides that in each case "the court shall determine

the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under *any* of the exemptions set forth in subsection (b) of this section, and the *burden* is on the *agency* to sustain its action." 5 U.S.C. § 552(a)(4)(B) (emphasis added).

The Government accepts that it may not deny public access to the letter at issue if *de novo* review requires it to prove (absent utmost deference) that it has met the specific requirements of the current Executive Order 12,958 setting forth the standards for the administration of Exemption 1. That Executive order forbids classification of information unless "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security *and* the original classification authority is able to identify or describe the damage." Executive Order No. 12,958, § 1.2(a)(4) (emphasis added). Unable to articulate the harm to national security from disclosure of the record at issue in this case, as is required by Executive Order 12,958, the Government asks the Court to abrogate the text of FOIA and conclude that *de novo* review of an Exemption 1 claim requires complete deference by the Court regardless of how general or conclusory the explanation for the exemption claim. According to the Government, any national security claim should be sustained, regardless of the specific requirements of the President's Executive order, unless the Government's explanation is entirely "implausible (even after giving it utmost deference)." Brief for the Petitioners ("Pet. Br.") at 47.

The Government strains to reconcile its opposition to genuine *de novo* judicial review of its Exemption 1 claims with the 1974 Amendments to the FOIA, which it admits "were intended to give courts some role in reviewing decisions to withhold information under Exemption 1...." Pet. Br. at 46. In 1974, Congress amended the FOIA in response to this Court's decision in *E.P.A. v. Mink*, 410 U.S. 73, 93 S.Ct. 827 (1973). The Court in *Mink* rejected the

argument that Congress in enacting the FOIA had intended the substantive propriety of the Government's classification decisions to be subject to judicial review. Congress responded by amending the FOIA in 1974 to expressly provide for *de novo* judicial review of the Government's substantive and procedural compliance with its national security executive order. In particular, Congress provided for *in camera* review of records to facilitate the Court's *de novo* review of Government Exemption 1 claims, and narrowed Exemption 1 to require that information withheld thereunder is "in fact properly classified pursuant to [an] Executive order." 5 U.S.C. § 552(b)(1). It is this plain statutory requirement of Exemption 1 and the plain language of the sitting President's Executive order that Respondent and *Amicus* NACDL ask the Court to enforce.³

³ The Court has declared that a clear statute may not be interpreted to avoid a constitutional concern. *Peretz v. United States*, 501 U.S. 923, 932, 111 S.Ct. 2661, 2667 (1991). Here there is no constitutional separation of powers concern raised by enforcement of the clear requirements of FOIA, contrary to the Government's suggestion. Exemption 1 applies the substantive classification standards established by the President in an Executive order. *De novo* judicial review ensures that the President's Executive order is properly administered by his subordinates. The President is free to change these classification standards at any time.

ARGUMENT

THE GOVERNMENT'S SUGGESTION OF AN "UTMOST DEFERENCE" STANDARD OF JUDICIAL REVIEW IS INCONSISTENT WITH THE DE NOVO REVIEW REQUIRED BY FOIA AND WOULD RENDER MEANINGLESS EXEMPTION 1'S REQUIREMENT THAT INFORMATION WITHHELD THEREUNDER BE "IN FACT PROPERLY CLASSIFIED PURSUANT TO THE [THE APPLICABLE] EXECUTIVE ORDER."

Congress considered the FOIA necessary "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599 (1976). This Court has declared that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 2326-2327 (1978). In the quarter century since its passage, the FOIA has been expanded and copied by every state in this country. The FOIA is recognized worldwide as one of the strongest open government laws, and foreign governments are on notice that information submitted to United States is subject to disclosure under the FOIA. 5 U.S.C. § 552; Executive Order 12,958, 3 C.F.R. § 333 (1996).

The FOIA reversed the presumption against disclosure of Government records. *Mink*, 410 U.S. at 79. Under the FOIA, Government records must be disclosed unless such records are specifically exempted from disclosure under one of nine exemptions. 5 U.S.C. §§ 552(a)(3), 552(b); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755, 109 S.Ct. 1468, 1472-1473 (1989). The Court has warned that "these limited exemptions do not obscure the basic policy that disclosure,

not secrecy, is the dominant objective" of FOIA. *Rose*, 425 U.S. at 361. Thus FOIA's statutory exemptions "must be narrowly construed." *Id.*

In contrast to the traditional standards for judicial review of agency action, which require the plaintiff to prove that Governmental agency action is "arbitrary, capricious or contrary to law" or not supported by "substantial evidence," the FOIA "expressly places the burden 'on the agency to sustain its action,' with respect to its exemption claims, and directs the district courts to 'determine the matter de novo.'" *Reporters Committee*, 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B)); compare 5 U.S.C. §§ 504 and 706(2)(A) with 5 U.S.C. § 552(a)(4)(B).⁴ In FOIA cases, the court may not rely upon the administrative record, but must independently develop its own record to determine whether the agency's exemption claim as to certain information is proper. *Mink*, 410 U.S. at 93. To insure that a Government agency is not withholding non-exempt information, the FOIA explicitly authorizes the court to evaluate "any" exemption claim by "examin[ing] the contents of . . . agency records *in camera*...." 5 U.S.C. § 552(a)(4)(B) (emphasis added); *Rose*, 425 U.S. at 378.

FOIA's judicial review requirements apply to all FOIA exemptions, including Exemption 1. 5 U.S.C. § 552(a)(4)(B). Congress enacted Exemption 1 to the FOIA in recognition of the need to protect from public disclosure certain information in the interests of national security. As previously stated, Exemption 1 permits the Government to withhold matters that are "(A) *specifically authorized under criteria established by an Executive order to be kept secret*

⁴ The Court has interpreted *de novo* review to mean a independent review by the Court to satisfy itself that the law has been applied correctly. See, e.g., *Choctaw Nation v. United States*, 119 U.S. 1, 30, 7 S. Ct. 75, 91-92 (1886) (for *de novo* judicial review the court must consider the matter "from the beginning, and as if [the issues] were new and had freshly arisen"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967), 87 S. Ct. 1088, 1093 ("*de novo*" means that "the court should make an independent determination of the issues").

in the interest of national defense or foreign policy and (B) *are in fact properly classified* pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (emphasis added). Each of these separate and independent statutory requirements must be satisfied for Exemption 1 to permit the Government to withhold information from the public. Accordingly, the Government's Exemption 1 claim may not be sustained if the Government fails to prove that the information withheld has been "in fact properly classified pursuant to [the applicable] Executive order."

I. FOIA's Plain Text Bars Judicial Review of Exemption Claims on the Basis of "Utmost Deference."

A statute must be given its plain meaning. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989) ("[w]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotations omitted). As explained herein, the FOIA plainly mandates independent court review of record withholding by a Government agency. The explicit statutory requirement of Exemption 1(B) that information be "in fact properly classified pursuant to [the applicable] Executive Order," and the requirements of the FOIA taken as a whole, bar the Government's proposal that its Exemption 1 claims be free of judicial review unless the claim is entirely "implausible (even after giving it utmost deference)." Pet. Br. at 47.

The words "utmost deference" nowhere appear in Exemption 1 or the FOIA. Instead, FOIA's judicial review provision expressly states that the court has jurisdiction "to order the production of any agency records *improperly* withheld from the complainant [and] [i]n such a case the court shall determine the matter *de novo*...." 5 U.S.C. § 552(a)(4)(B) (emphasis added). This mandated *de novo* standard of review is at odds with "utmost deference." Moreover, FOIA's judicial review provision affirmatively

puts the burden on the Government to prove that particular information falls with one of these narrow exemptions to mandatory disclosure and expressly authorizes the court to conduct an *in camera* review of the withheld information to determine whether it is exempt. 5 U.S.C. § 552(a)(4)(B). These statutory provisions would be superfluous to an utmost deference standard of review; they are meaningful only with independent judicial review of the Government's exemption claims. Each statutory provision should be given meaningful effect. *Bennett v. Spear*, 520 U.S. 154, 166, 117 S. Ct. 1154, 1163 (1997).

"Utmost deference" is at odds not only with FOIA's *de novo* review provision, but also with Exemption 1 itself. Exemption 1 may allow withholding of information only if that information is "in fact properly classified pursuant to [the applicable] Executive Order." 5 U.S.C. § 552(b)(1). A court cannot determine whether information is "properly" classified without the ability to substitute its judgment for that of the Government agency that claims to have classified that information. Exemption 1(B) thus on its face requires an independent determination by the court that the substantive requirements of the applicable Executive order are met. Furthermore, this straightforward reading of "properly" in Exemption 1 comports with Congress's requirement of *de novo* judicial review to determine whether "to order production of any records *improperly* withheld." 5 U.S.C. § 552 (a)(4)(B) (emphasis added). The Court has repeatedly held that same or similar terms in a statute should be interpreted the same way. *Sullivan v. Stroop*, 496 U.S. 478, 484-85, 110 S. Ct. 2499, 2503-2504 (1990); *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371, 108 S.Ct. 626 (1988).

The only text of the FOIA cited by the Government in support of its argument is the "substantial weight" standard of review of agency determinations with respect to the technical feasibility of accessing electronic records. 5 U.S.C. § 552(a)(4)(B) ("In addition to any other matters to which a court accords substantial weight, a court shall accord

substantial weight to an agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)"). But that standard of review is separate and independent from the *de novo* required for exemption claims, which Congress has not amended since 1974. *See infra*, Section II, at pp. 11-16.²

"Utmost deference" is no more than the Government's modern day formulation of the complete discretion to withhold information that it enjoyed before Congress enacted the FOIA. "Utmost deference" is precluded by FOIA's unambiguous language and purpose "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361. For this reason alone, the Government's proposal to substitute "utmost deference" for "*de novo*" review should be rejected and the decision of the Court of Appeals affirmed.

II. FOIA's Legislative History Underscores that "Utmost Deference" is an Impermissible Standard of Review of Exemption Claims.

FOIA's unequivocal text renders resort to its legislative history unnecessary. *United States v. Gonzales*, 520 U.S. 1, 4, 117 S.Ct. 1032, 1035 (1997). FOIA's legislative history nevertheless reinforces that Congress intended the Government's Exemption 1 claims to be subject to independent judicial review. FOIA has always required *de novo* judicial review of Government agency exemption claims. As originally enacted in 1966, FOIA provided that "the court shall determine the matter *de novo* and the burden shall be upon the agency to sustain its action." 5 U.S.C. § 552(c)(1966). Congress required independent court determination of the correctness of the FOIA exemption

² Also compare FOIA's *de novo* review for exemption claims with FOIA's arbitrary and capricious standard of review for disciplinary proceedings against agency employees for improper withholding of agency records, 5 U.S.C. § 552(a)(4)(F)(FOIA).

claim "in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess., 2, 8 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966).

In 1973, the Court held in *Mink* that a court in a FOIA case must require the Government to prove by detailed affidavits and oral evidence that its exemption claims are proper before requiring *in camera* inspection by the court of the withheld information. 410 U.S. at 93. The Court explained that *de novo* review under FOIA provides that the Government "agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly [within the exemption]. The burden is, of course, on the agency resisting disclosure, . . . and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection." *Id.* The Court remanded the case to allow the district court to develop the factual record necessary to enable it to segregate non-exempt information from exempt information in each record at issue. *Id.*

In reaching this result, *Mink* required *de novo* review of the Government's Exemption 5 claim but not its Exemption 1 claim. 410 U.S. at 84, 93-94. The Court interpreted Exemption 1 as then written to require only that the record have been marked classified pursuant to an Executive order, a fact that the parties in *Mink* did not dispute. *Id.* at 84. At the time of the *Mink* decision Exemption 1 protected from disclosure information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." *Id.* at 81. The Court ruled that that language of Exemption 1 did not authorize judicial review of the Government's

compliance with the substantive requirements of its Executive order. *Id.* at 84.⁶

In 1974, Congress amended Exemption 1 to the FOIA to also require that information withheld thereunder be "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(1976). In addition, Congress codified the Court's interpretation of *de novo* review set forth in the *Mink* decision. The 1974 amendments to the FOIA authorize *in camera* review of records withheld as exempt under any FOIA exemption and require the Government to segregate and release non-exempt information from records containing exempt information. 5 U.S.C. § 552(a)(4)(B)(1976). As a result of the 1974 amendments, the FOIA requires that "the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under *any* of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B)(emphasis added). It also requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

The Conference Report explaining these amendments declares their purpose is to provide for *de novo* review of Exemption 1 claims:

⁶ In his concurring opinion in *Mink*, Justice Stewart seized upon Congress' failure to provide the courts with a "means to question an Executive decision to stamp a document 'secret,' however, cynical, myopic, or even corrupt that decision might have been." *Mink*, 410 U.S. at 95. Under Exemption 1 as then written, "the only 'matter' to be determined *de novo* under § 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret." In Justice Stewart's estimation, "Congress chose . . . to decree blind acceptance of Executive fiat." *Id.*

In *EPA v. Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under Section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12741 amends the present law to permit such *in camera* examination at the discretion of the court. . . . Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

S. Rep. No. 1200, 93rd Cong., 2d Sess. at 9 (1974); see Pub. L. 93-502, §§ 1-3, 88 Stat. 1561 (1974). The Conference Report further declares that

[w]hen linked with the authority of the courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, [the new requirements of Exemption 1] clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al.*, *supra*, with respect to *in camera* review of classified documents.

S. Rep. No. 1200, *supra*, at 12.

The legislative history of the 1974 amendments to the FOIA further reflects that Congress considered and rejected a proposal to limit judicial review of the Government's Exemption 1 claims. In particular, Congress rejected legislation that would have provided that

(ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, . . . [i]f there has been filed in the record an affidavit by

the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by statute or Executive order referred to in subsection (b)(1) of this section, *the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.*

S. 2543, 93d Cong., 2d Sess., § b(2) (emphasis added), reprinted in Staffs of Senate Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents (Committee Print 1975 (hereafter cited as Source Book), at 282 (emphasis added). The Committee Report accompanying this unsuccessful legislation explained that "this standard of review does not allow the court to substitute its judgment for that of the agency - as under a *de novo* review." S. Rep. No. 93-854, 93rd Cong., 2d Sess. (1974), reprinted in Source Book, *supra*, at 168. This legislative proposal to establish a special "reasonable basis" standard of review in national security cases was voted down on the Senate floor and Congress instead provided for full *de novo* review of the Government's Exemption 1 claims. 120 Cong. Rec. 17031-17032 (1974); 5 U.S.C. § 552(a)(4)(B).

The Government correctly notes that the Conference Report to the 1974 amendments states that "the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." S. Rep. No. 1200, *supra*, at 12. *Amicus* agrees that the courts should consider important to their independent determinations *detailed* affidavits from the Government in support of its exemption claims. The deference to factual representations regarding foreign affairs or national security

is based on the knowledge and expertise of the Executive branch in these areas. However, a Conference Report statement urging courts to accord "substantial weight" to *detailed* affidavits says nothing about conclusory affidavits such as those filed by the Government in this case, nor may it alter the *de novo* standard of review expressly required in the statute. *City of Chicago v. EDF*, 511 U.S. 328, 337, 114 S. Ct. 1588, 1593 (1994) (legislative history may not trump clear statutory language). Extraordinarily, the Government now proposes that this Court go beyond giving the Government's detailed affidavits "substantial weight" to establish an "utmost deference" standard of review for the ultimate question of proper classification that would negate the 1974 FOIA amendments. Pet. Br. at 13. The President vetoed the 1974 FOIA amendments because the statutory language does not restrict the requirement of *de novo* review or the propriety of *in camera* examination with respect to Exemption 1 claims for which the Government bears the burden of proof. Message from the President of the United States Vetoing H. R. 12471 An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, H.R. Doc. No. 93-983, 93rd Cong., 2d Sess., reprinted in Source Book, *supra*, note 28, at 483-485. Congress overrode this veto. Freedom of Information Act Veto Override, Congressional Record at S.19823 (November 21, 1974), reprinted in Source Book, *supra* note 28, at 431-434 and 480. There is no basis in FOIA's text or legislative history for an "utmost deference" standard of review of the Government's Exemption 1 claims and the Government's proposal therefore should be rejected.

An utmost deference standard of review for Government's Exemption 1 claims would eviscerate the public's right under the FOIA statute to challenge those claims, and would permit just the judicial rubber-stamping of agency discretion that Congress intended *de novo* judicial review to prevent. In so doing, it would permit Exemption 1 to become a catch-all exemption under the FOIA for any information that is not otherwise exempt and that the

Government, for whatever reason, does not want the American people to know.

CONCLUSION

For the reasons stated, the *Amicus Curiae* National Association of Criminal Defense Lawyers urges this Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LISA B. KEMLER
NATIONAL
ASSOCIATION OF
CRIMINAL
DEFENSE LAWYERS
108 North Alfred St.
Alexandria, VA 22314
(703) 684-8000

ELEANOR H. SMITH
Counsel of Record
CHRISTINE M. LEE
ZUCKERMAN, SPAEDER
GOLDSTEIN, TAYLOR
& KOLKER, L.L.P.
1201 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 778-1800

*Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers*

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OCTOBER TERM, 1999

CLERK

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF
JUSTICE; AND UNITED STATES DEPARTMENT OF STATE,

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNION AS *AMICI CURIAE* SUPPORTING RESPONDENT**

Kate Martin
CENTER FOR NATIONAL
SECURITY STUDIES
National Security Archive
2130 H Street, N.W., Suite 701
Washington D.C. 20037
(202) 944-7060

Mark H. Lynch
Counsel of Record
Jay T. Smith
Elizabeth A. Snodgrass
Gregory M. Williams
Gerald J. Russello
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5544

Counsel for Amici Curiae

Additional Counsel
Listed Inside Cover

November 19, 1999

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3219

Louis M. Bograd
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-1817

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

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Dana Priest, <i>Bombing By Committee:</i> <i>France Balked At NATO Targets,</i> Wash. Post., Sept. 20, 1999, at A1	23
Stephen W. Stathis, <i>Executive Cooperation:</i> <i>Presidential Recognition of the</i> <i>Investigative Authority of Congress and the</i> <i>Courts</i> , 3 J. L. & Pol. 183 (1986)	14
10 <i>Works of Thomas Jefferson</i> (P. Ford ed., 1905)	21
<i>The Writings of James Madison</i> (G. Hunt ed., 1910)	25

INTEREST OF THE AMICI

The Center for National Security Studies is a nongovernmental, nonprofit civil liberties organization that works to ensure that government actions undertaken in genuine pursuit of national security interests do not have the effect of violating the rights of individuals or undermining constitutional government. Since 1975, the Center has worked to secure the public's right to know about foreign policy and national defense matters.¹

The National Security Archive is an independent research institute and library located at the George Washington University. The Archive collects and publishes declassified documents obtained through the Freedom of Information Act concerning United States foreign policy and national security matters. Through litigation and public advocacy, it also works to defend and expand public access to government information.

The Federation of American Scientists (FAS), which was founded in 1945 by Manhattan Project scientists to promote nuclear arms control, is a national organization of 2,000 scientists and engineers including 57 Nobel laureates. FAS today conducts policy research and advocacy on a range of national security policy issues. In the course of its activities, FAS depends upon reliable access to government information and routinely utilizes the Freedom of Information Act.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights. The ACLU has been deeply involved, since its founding in 1920, in the clash between government claims of national security and the people's right to know what their government is doing. At times, that clash takes the form of direct government restraints on speech; in other cases, it centers on government efforts to restrict access to information that is presumptively public. The ACLU has appeared before this Court on numerous occasions to help resolve that conflict.

SUMMARY OF ARGUMENT

As demonstrated in Respondent's brief, the showing made by the government to justify its withholding of information under Exemption 1 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was in contravention of the plain terms of a controlling Executive Order. Because this ground is sufficient for affirmance of the court of appeals' decision, there is no reason for the Court to address either the proper standard of review in Exemption 1 cases or the government's sweeping claims concerning separation of powers in the realm of foreign affairs.

If the Court nevertheless chooses to address these issues, it should reject the government's claim that Congress intended to adopt an "utmost deference" standard of review under Exemption 1 of FOIA. The language of FOIA expressly requires "*de novo*" review and the legislative history of FOIA makes clear that Congress intended this review to be searching and independent.

FOIA's provision for *de novo* review creates no separation of powers problem. Congress' concurrent power over national security and foreign affairs information is well established and contradicts the government's sweeping claim

that the executive has plenary and exclusive control in this area. The Constitution also imposes no general disability on the judiciary in cases affecting the Nation's foreign relations. Rather, in such cases, courts retain their authority and responsibility independently to review the executive's "foreign affairs" and "national security" claims.

Finally, the Court should not overlook the fact that Congress in enacting FOIA and the President in issuing the current Executive Order set a standard of openness for the United States government. This standard exemplifies this Nation's most basic values and traditions and allows the United States to be a model of openness for the rest of the world. The position taken by the government in this case threatens both.

ARGUMENT

I. THE COURT SHOULD DECLINE THE GOVERNMENT'S INVITATION TO ADDRESS CONSTITUTIONAL ISSUES NOT CLEARLY PRESENTED.

Although the government devotes the majority of its brief to constitutional argument over the separation of powers, the court of appeals' decision simply does not pose a constitutional problem. As Respondent demonstrates in his brief, the showing made by the agency in this case was inadequate under the plain terms of the Executive Order issued by President Clinton, Exec. Order No. 12,958, 3 C.F.R. 333 (1996), Pet. App. 66a-111a ("Clinton Order"). Accordingly, there is no occasion for the Court to consider whether government affidavits are entitled to "utmost deference" under FOIA or to explore the constitutional implications of *de novo* review. The government's attempt to use the Constitution as a tool to twist the meaning of FOIA is directly contrary to this Court's policy of not "pronounc[ing] upon the relative constitutional authority of Congress and the

Executive Branch unless it finds it imperative to do so." *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989).

Indeed, as detailed in Part III.A below, any decision in this case addressing the separation of powers between Congress and the President in the area of foreign affairs will potentially affect a wide variety of congressional enactments that currently strike a balance between the political branches in the management of national security information. Rather than enter this thicket unnecessarily, the Court should decline to address the government's constitutional claims.

II. THE GOVERNMENT'S PROPOSED "UTMOST DEFERENCE" STANDARD CONTRADICTS THE LANGUAGE AND LEGISLATIVE HISTORY OF FOIA.

The government argues that when Congress amended the Freedom of Information Act in 1974, it adopted President Ford's position that courts should uphold a classification decision if there is any "reasonable basis to support it." Pet. Br. 46. This argument, unsupported by the text and legislative background to the amendments, is nothing less than an attempt to rewrite history.

The plain language of FOIA states that when reviewing an agency's non-disclosure determination, "the court shall determine the matter de novo" and "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). In *EPA v. Mink*, 410 U.S. 73 (1973), this Court interpreted Exemption 1 (as originally enacted) narrowly, ruling that FOIA did not permit *in camera* inspection of documents containing national security information and thus did not authorize the review of classified documents to separate non-secret material for disclosure. Congress reacted promptly, specifically amending FOIA to override the *Mink* decision. In addition to providing for *in camera* inspection, Congress

also amended the statute to specify that materials may be withheld only if they "are in fact properly classified pursuant to [an] Executive Order." 5 U.S.C. § 552(b)(1)(B).

In vetoing the 1974 FOIA amendments, President Ford wrote that under those amendments, if a judge found both the government's and the plaintiff's positions to be reasonable, the government would not have met its burden. His veto message proposed that Congress instead provide that an agency decision be upheld if there is any "reasonable basis to support it." Message from the President Vetoing H.R. 12,471, H.R. Doc. No. 93-383, 93d Cong., 2d Sess., at (III) (1974). Congress responded by overriding the President's veto by a supermajority vote. There is no way to characterize this legislative override as Congress accepting the President's proposed standard.²

As the government has noted, the House and Senate conferees on the 1974 FOIA amendments stated their expectation that courts would in practice accord "substantial weight" to an agency affidavit explaining why disclosure of a document might damage national security. On this snippet of legislative history rests the government's argument that

² The government's out-of-context quotation from Representative Moorhead does not support their claim. Pet. Br. 45. It is clear from the full quote that Representative Moorhead was responding to the President's statement that "the courts would consider all attendant evidence" in assessing the classification, and was not addressing the substantive standard the President proposed. House Action and Vote on Presidential Veto, 93d Cong., 2d Sess. (1974), reprinted in Senate Committee on the Judiciary and House Committee on Government Operations, *Freedom of Information Act and Amendments of 1974* (P.L. 93-502): Source Book 405 (1975) ("Source Book") ("[I]n the procedural handling of [FOIA] cases . . . this is exactly the way the courts would conduct their proceedings.") (Rep. Moorhead).

Congress required that judges accord "utmost deference" to the government in Exemption 1 cases.³

The conferees' expectation, however, was not a requirement, and no change was made to the standard of *de novo* review. It is fundamental that such legislative history cannot override the plain language of a statute.⁴ The conferees were simply stating their belief that courts would give substantial weight, not deference, to detailed government affidavits in the same way that any finder of fact may give substantial weight to evidence that it finds persuasive from knowledgeable or expert witnesses. The proponents of *de novo* review in Congress stressed "the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray v. Turner*, 587 F.2d 1187,

³ With regard to Exemption 1 in particular, the Conference Report expressly stated that the 1974 Amendments were intended to override *Mink* by allowing *in camera* inspection of documents by the court "as part of their *de novo* determination." S. Rep. No. 1200, at 12. It then stated that:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Id.

⁴ See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

1194 nn.18-19 (D.C. Cir. 1978) (per curiam) (citing statements by Senators Muskie, Ervin, and Chiles).⁵ The conference committee, by stating its expectation regarding substantial weight, "countered th[e] image [of judges making reckless disclosures] by registering its anticipation that rational judges conducting *de novo* reviews would naturally be impressed by any special knowledge, experience, and reasoning demonstrated by agencies with expertise and responsibility in matters of defense and foreign policy." *Id.* at 1213 (Wright, C.J., concurring). Congress therefore "soundly rejected" the contention that judges were unqualified to review classifications and "refused to create a presumption in favor of agency classifications or to retreat from full *de novo* review." *Id.* at 1210 (Wright, C.J., concurring).

The courts of appeals have repeatedly noted the importance of the *de novo* standard in properly applying the FOIA exemptions, including Exemption 1. "De novo review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur" *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 141 (2d Cir. 1994); see also *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir.

⁵ Indeed, Senator Muskie, in successfully arguing against the President's "reasonableness standard," stated that "by giving classified material a status unlike that of any other claimed Government secret, we foster the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge." Source Book at 305. Similarly, in the House debate, Representative Moss, the primary author of the original 1966 FOIA, opined that the qualities needed to assess whether a classified document met the requirements of an executive order were "intelligence, sensitivity, commonsense and an appreciation for the right of the people to know what their Government is doing and why." *Id.* at 257. He was fully confident that the judiciary had these qualities, and could make those assessments. *Id.*

1999) (rejecting, in Exemption 1 context, more deferential standard and applying *de novo* review as more consistent with FOIA). The judicial role in reviewing the government's classification decision is crucial in Exemption 1 cases, in which the adversary process is necessarily diminished because the plaintiff lacks access to the classified materials at issue and often lacks the information necessary to challenge the government's decision. See *id.* at 290; *McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir. 1993). Given the inherent limitations on advocacy in Exemption 1 cases, adopting the "utmost deference" standard would reduce judicial proceedings to little more than a formality, and thus contravene the clear intent of Congress.

III. THE CONSTITUTION DOES NOT MANDATE "UTMOST DEFERENCE" TO AN AGENCY'S INVOCATION OF EXEMPTION 1.

A. Congress Has The Constitutional Authority To Subject Agency Determinations Under FOIA Exemption 1 To *De Novo* Review.

In Exemption 1 and in FOIA more generally, Congress sought "to balance the public's needs for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). In striking that balance, Congress placed only modest restraints on the executive's management of national security information. FOIA Exemption 1 permits the President to determine in an Executive Order what criteria govern the classification and release of such information and requires only that executive agencies abide by that order. Nevertheless, the government seeks to undo even these limited measures by arguing that the President's constitutional authority over foreign affairs requires a standard of "utmost deference" that would, in effect, prevent a court from ever ordering the release of information that the

executive asserts should be withheld under Exemption 1.⁶ Although the government warns of the constitutional implications of enforcing Exemption 1 as written, a holding that the executive branch is not bound by even the slight restrictions contained in Exemption 1 would present far graver constitutional difficulties.

1. Congress And The President Share Responsibility For Foreign Affairs.

The government grounds its theory of "plenary and exclusive" executive control over foreign affairs principally on Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Despite *Curtiss-Wright's* sweeping rhetoric, that case did not hold that Congress was ousted from the realm of foreign policy. As Justice Jackson observed, *Curtiss-Wright* "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J. concurring) ("*Steel Seizure Case*"). Indeed, that case focused not on the President's foreign affairs powers, but on an unsuccessful challenge to the delegation by Congress of some of its foreign affairs powers to the executive. "Much of [Justice Sutherland's opinion] is *dictum*." *Id.*

It is well settled that the President does not possess exclusive authority over matters touching on the Nation's foreign relations. Rather, this power is shared with

⁶ See Pet. Br. 37 (asserting the "inappropriateness of courts superintending Executive Branch judgments about the need to preserve the confidentiality of communications bearing on national security"); *id.* at 38 (adverting to "President's *singular* authority to maintain secrecy") (emphasis added).

Congress. As Justice Jackson's much-quoted concurrence in the *Steel Seizure Case* instructs, the President's foreign affairs powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635 (Jackson, J., concurring). In a famous passage, Justice Jackson described the interplay of executive and legislative power in this field:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38 (footnote omitted) (Jackson, J., concurring). Justice Jackson concluded that President Truman's attempt to seize the steel mills was, in fact, incompatible with the congressional will and that neither the constitutional clause vesting the executive power in the President nor the clause making him Commander-in-Chief conferred on the President the authority to defeat this expression of congressional policy. *Id.* at 655 (Jackson, J., concurring).

The government's assertion that the courts must accord the President's classification decisions "utmost deference" despite FOIA's clear command to the contrary urges action that is undoubtedly "incompatible with the expressed or implied will of Congress." *Id.* at 637. The government's position therefore cannot be sustained unless (1) Congress is constitutionally disabled from acting in this important field, or (2) Exemption 1 "impermissibly undermine[s]" the powers of the Executive Branch, . . . or 'disrupts the proper

balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citations omitted; alterations in *Morrison*).⁷ Neither proposition is true.

Although the Constitution does not expressly allocate control over information pertaining to foreign affairs or national security to either the executive or legislative branch, it is clear that Congress possesses significant authority in this area. First, the Senate plays a key foreign policy role in advising on and consenting to treaties and in confirming the appointment of ambassadors. U.S. Const. art. II, § 2, cl. 2. Second, the Framers enumerated multiple powers that Congress enjoys in the realm of foreign relations, including broad authority to "regulate Commerce with foreign nations" (cl. 3) and the power "to make Rules for the Government and Regulation of the land and naval forces" (cl. 14), a grant broad enough to include authority to regulate the government's sensitive national security information. U.S. Const. art. I, § 8.⁸ Third, Congress is the repository of all the federal government's legislative powers, including the power to "make all Laws" that are "necessary and proper" to carry

⁷ The government devotes several pages to the potential disclosure of intelligence sources and methods, but Congress has categorically exempted such information from disclosure under Exemption 3. See *Central Intelligence Agency v. Sims*, 471 U.S. 159, 181 (1985).

⁸ Article I, section 8 of the Constitution also vests Congress with authority to "provide for the common Defence" (cl. 1), "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" (cl. 10), "declare War" (cl. 11), "raise and support Armies" (cl. 12), and "provide and maintain a Navy" (cl. 13). Congress' appropriations power, *id.* art. I, § 9, cl. 7, also gives it substantial authority in the area of foreign policy.

out not only congressional powers but the powers of the United States government generally.⁹

Finally, the Court in *Mink* expressly recognized that Congress shares power over foreign affairs information when it stated that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures [governing the disclosure of national security information under FOIA Exemption 1] - subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." 410 U.S. at 83; see also *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) ("[T]he regulation and mandatory disclosure of documents in the possession of the Executive Branch. . . has never been considered invalid as an invasion of [executive] authority.").¹⁰

This Court has never held that the executive has plenary power over information pertaining to foreign affairs. In each of the cases on which the government relies, the executive action in question was taken either pursuant to, or in the absence of, congressional legislation.¹¹ The decisions neither

⁹ This Court has long recognized that an indispensable adjunct to Congress' power to legislate is its power to investigate. See *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). The government's argument that the executive has plenary control over national security information would, if accepted, eviscerate Congress' power of investigation in a constitutionally-recognized area of vital legislative concern.

¹⁰ Executive privilege extends only to "high-level communications" between the President and "close advisors." *United States v. Nixon*, 418 U.S. 683, 703, 706 (1974).

¹¹ See *Sims*, 471 U.S. at 168-70 ("Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process."); *Haig v. Agee*, 453 U.S. 280, 289, 306 (1981) ("The principal question before us is whether

hold nor intimate that the President can refuse to disclose foreign affairs information in the face of a contrary expression of congressional will. Typical in this regard is *Department of Navy v. Egan*, 484 U.S. 518 (1988), which held that the Merit Systems Protection Board, in reviewing the termination of a Navy employee, did not have the statutory authority to review an agency's revocation of a security clearance. Thus, not only was the conflict in *Egan* within the executive branch (between the Navy and the Board), the question was one of *statutory interpretation* rather than Executive prerogative.

The government relies on dicta in *Egan* for the "utmost deference" standard it now urges on the Court. See Pet. Br. 16. However, in language not quoted in the government's brief, the Court explicitly acknowledged that judicial deference gives way when Congress "specifically provides otherwise." *Egan*, 484 U.S. at 530. That is precisely what Congress did in Exemption 1.

This Court has never struck down on separation of powers grounds an Act of Congress that did not violate a specific provision of the Constitution.¹² The constitutional test in the absence of such an explicit textual commitment of authority to the executive is whether Congress has

[the Passport Act] authorizes" the Secretary of State to revoke a citizen's passport on national security grounds; concluding Congress had approved the Secretary's authority to do so); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (Congress did not intend to grant judicial review of orders of the Civil Aeronautics Board denying citizen carriers' applications to engage in overseas and foreign air transportation).

¹² See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 946-59 (1983) (violating bicameralism and presentment); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (appointments clause).

impermissibly intruded on the President's authority or prevented him from accomplishing his constitutionally assigned duties. The government cannot reasonably claim that Exemption 1 does either. Although Congress has broad authority to legislate requirements concerning national security information, the limitations it has placed on executive discretion in FOIA Exemption 1 are quite modest. Congress requires only that the President adhere to his own Executive Order. Put simply, Exemption 1's *de novo* standard of review falls well within the constitutional powers of Congress.¹³

2. Congress Has Repeatedly Exercised Its Constitutional Authority Over The Management And Disclosure Of National Security Information.

The government further argues that Congress has "acquiesced" in the President's exercise of plenary control over national security information. Pet. Br. 20-21. Contrary to the government's flawed historical account and as constitutional scholars have detailed, Congress has vigorously resisted the President's efforts to withhold information pertaining to foreign affairs since the very founding of the Nation.¹⁴ The government's claim is most

¹³ See *Morrison*, 487 U.S. 654 (upholding independent counsel statute because it was a modest restriction on executive authority); *Administrator of General Services*, 433 U.S. at 443; *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, J.) (holding executive action subject to congressional regulation even during undeclared war).

¹⁴ See generally Raoul Berger, *Executive Privilege: A Constitutional Myth* 163-208 (1974); Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J. L. & Pol. 183 (1986).

clearly rebutted by the 1974 Amendments to FOIA themselves, which were passed by a supermajority over President Ford's veto.

Far from being unique, Exemption 1 is but one of many instances in which Congress has required the executive branch to disclose national security information to either the legislature or the public. Congress has, for example, created an elaborate statutory structure for the oversight of intelligence agencies, a central element of which is the requirement that the President and the Director of Central Intelligence keep Congress, through its Intelligence Committees, fully and currently informed of all intelligence activities. See Intelligence Oversight Act, 50 U.S.C. § 413 (1991). Congress, moreover, has adopted rules whereby each House may, even over the President's objection, declassify and publicly release classified information originating in the executive branch. S. Res. 400, 94th Cong.; House Rule XLVIII, 106th Cong. Congress has passed several statutes limiting the restraints the executive branch may impose on employees granted access to national security information.¹⁵ Congress also has legislated explicit declassification standards for certain categories of information narrower than those specified in the governing Executive Order.¹⁶

¹⁵ See Continuing Resolution for Fiscal Year 1988, § 630, 101 Stat. 1329-432 (1987) (prohibiting the expenditure of funds for executive employee secrecy agreements that forbid employees from revealing "classifiable" information) (considered in *Garfinkel*, 490 U.S. 153 (1989)); Omnibus Consolidated Appropriations Act 1997, § 625, 110 Stat. 3009-59 (1996) (requiring that secrecy agreements signed by employees with access to classified information state on their face that the agreements do not supersede or alter the right of employees to furnish information to Congress).

¹⁶ President John F. Kennedy Assassination Records Collection Act of 1992, 106 Stat. 3443 (1992) ("[L]egislation is necessary

In short, far from acquiescing in presidential control of national security information, Congress has asserted its constitutional authority in this area on countless occasions and in numerous ways. Acceptance of the government's view of exclusive executive authority would cast a long shadow over myriad congressional enactments and would severely disrupt the equilibrium between the political branches.

B. The Constitution Does Not Mandate That The Judiciary Afford "Utmost Deference" To Executive Branch Classification Decisions.

Lacking any textual basis in the Constitution for its "utmost deference" standard, the government resorts instead to arguments regarding institutional competence. Pet. Br. 21-27. Because judges are not "expert" in foreign affairs and because the field is complex, the government contends that, in "foreign affairs" cases, the courts' statutory and constitutional jurisdiction is trumped by executive power. Although the government concedes that the judiciary is not so incompetent as to be excluded from hearing Exemption 1

because the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy"); *see also* Nazi War Crimes Disclosure Act, 112 Stat. 1859 (1998) (requiring release of Nazi war criminal records subject to statutorily prescribed exceptions); Foreign Relations of the United States Historical Series Act, 22 U.S.C. § 4351 (Supp. 1999) (requiring that "all records needed to provide a comprehensive documentation of the major foreign policy decisions and actions of United States Government" be declassified for inclusion in the State Department's public "Foreign Relations" series subject to statutorily prescribed exceptions).

cases entirely, *id.* 12, 46, it nevertheless advocates a standard that would, in practice, render judicial proceedings little more than a rubber stamp. As elaborated below, the Constitution permits – and indeed requires – that courts take on a much more meaningful role.

In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), the petitioners urged that certain decisions by the Secretary of Commerce deserved utmost deference – and indeed were "unsuitable for judicial review" – simply "because they involve[d] foreign relations." *Id.* at 229. The Court's holding rejecting this argument bears quoting at length:

As *Baker [v. Carr]* plainly held, . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . *We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.*

Id. at 230 (emphasis added). *Japan Whaling* makes it clear that the mere fact that a case arises in the foreign affairs context does not change the court's basic chore or diminish its basic competence.

Courts routinely entertain cases that have far-reaching implications for the Nation's foreign relations without "transgress[ing] . . . the proper boundaries of judicial

review," Pet. Br. 29.¹⁷ Indeed, the Constitution explicitly commits to the federal courts several categories of cases that inevitably have foreign affairs ramifications: "Cases . . . arising under . . . Treaties"; "all Cases affecting Ambassadors, other public Ministers and Consuls"; "all Cases of admiralty and maritime Jurisdiction"; and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1.¹⁸ As the Court has emphasized, despite "sweeping statements" in the case law about the courts' competence to address "questions touching foreign relations," "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962); accord *Goldwater v. Carter*, 444 U.S. 996, 999-1000 (1979) (Powell, J., concurring).

In arguing to the contrary, the government principally relies on dicta from *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). See Pet. Br. 21-22. That case did not test the constitutional bounds of the judiciary's role in foreign affairs. Rather *Waterman* turned

¹⁷ Even routine cases may implicate foreign relations. "[I]n our 'one world' in trade, finance and communication; in an age where every occurrence may be known elsewhere, instantly - any case in any court in the United States might become grist for transnational mills and become of interest to U.S. foreign relations." Louis Henkin, *Foreign Affairs and the United States Constitution* 133 (2d ed. 1996).

¹⁸ Indeed, the Framers committed these cases to the jurisdiction of the federal courts in large part *because* these cases had the potential to affect the United States' external relations. See *The Federalist No. 80*, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.").

on the proper construction of the Civil Aeronautics Act. In that statute, Congress explicitly excepted from judicial review "any order in respect of any *foreign* air carrier subject to the approval of the President as provided in section 801 of this Act." *Waterman*, 333 U.S. at 106 (emphasis added). The statute also required presidential approval of orders relating to *domestic* air carriers engaged in "overseas or foreign air transportation," *id.*, but said nothing specific about judicial review of such orders. The Court found that Congress nevertheless intended to preclude judicial review for both types of orders primarily because the administrative process under the statute included no mechanism for the President to explain the reasons for his actions regarding either category of order. *Id.* at 110-11. It was in this context that the Court observed the *practical*, not necessarily constitutional, limits that underlay Congress' decision to preclude review.

FOIA could not present a more distinct case. First, there is absolutely no ambiguity in FOIA's judicial review provisions. Second, the *Waterman* Court worried that the judiciary would be asked to act on orders subject to presidential approval "without the relevant information," *i.e.*, without any expression of the President's rationale. *Id.* at 111. FOIA allows for - and indeed requires - full communication between the executive and the court considering an Exemption 1 claim. Third, under the statute at issue in *Waterman* courts could not "sit *in camera* in order to be taken into executive confidences." *Id.* The 1974 Amendments to FOIA make such proceedings possible. Thus, the broad dicta in *Waterman* does not suggest that any problem of constitutional dimensions is present in this case.

The Court's approach to an analogous situation involving "foreign affairs" and "national security" claims is instructive. In considering executive claims of an evidentiary privilege for "national security" or "diplomatic" materials, the Court has refused to give the executive *carte blanche*. Rather, the

court has affirmed the competence and responsibility of the judiciary to scrutinize claims of a threatened national security harm – and if necessary to review the “secret” documents. In so holding, the Court has stressed that this review should be an independent judicial function. In the leading case regarding the state secrets privilege, this Court stressed that “[t]he [district] court itself must determine whether the circumstances are appropriate for the claim of privilege,” “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers” even when that evidence relates to foreign affairs. *United States v. Reynolds*, 345 U.S. 1, 8-10 (1993) (emphasis added).

Nor has the Court accepted the government’s contention that courts are somehow constitutionally or inherently incapable of grasping the executive’s “foreign affairs” and “national security” positions. See Pet. Br. 24-25, 27. In *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), the Court confronted the issue of whether the government was required to obtain a warrant to perform so-called “national security” surveillance. In urging that a warrant was not required, the government, as in this case, “insist[ed] that courts ‘as a practical matter would have neither the knowledge nor the techniques necessary . . . to protect national security.’ These security problems, the Government contend[ed], involve ‘a large number of complex and subtle factors’ beyond the competence of courts to evaluate.” *Id.* at 319 (quoting Reply Brief for the United States). The Court, however, pointedly rejected “the Government’s argument that internal security matters are too subtle and complex for judicial evaluation.” *Id.* at 320. As Justice Powell explained, “Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in [these] cases.” *Id.* In fact, the Court has recognized that review of the executive’s claims by “a ‘neutral and detached magistrate’”

is particularly important in contexts implicating national security. *Id.* at 316 (citation omitted).

Congress evidently shares both Justice Powell’s confidence in the competence of the courts to evaluate “foreign affairs” and “national security” evidence under FOIA and his recognition of the importance of neutral judicial review of the executive’s decisions in these fields. Supporters of the 1974 FOIA Amendments “stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security.” *Ray*, 587 F.2d at 1194. Senator Chiles agreed, emphasizing not only the courts’ competence, but their independence:

We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.

120 Cong. Rec. 17028 (1974) (Sen. Chiles), cited in *Ray*, 587 F.2d at 1194.

These authorities illustrate that, far from challenging the Constitution’s separation of powers, the Court’s insistence on judicial competence to decide cases even if they touch on foreign affairs or national security reflects and upholds a key aspect of that system – the independence of courts from domination by the executive. See 10 *Works of Thomas Jefferson* 404, n. (P. Ford ed., 1905) (letter of June 20, 1807, from President Thomas Jefferson to United States Attorney George Hay) (“The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the

judiciary.”), quoted in *Clinton v. Jones*, 520 U.S. 681, 716 (1997). Reading FOIA and the Constitution to require the courts to afford “utmost deference” to whatever “foreign affairs” justification the executive branch offers constitutes an assault on that independence in its most basic form, one that the court below properly resisted by seeking more from the executive than a “one-size-fits-all” justification for its action in this case. In requiring the State Department to identify and describe damage to the national security as defined in the Clinton Order, the court of appeals was properly cognizant of the executive branch’s foreign policy assessments. But the court could not, consistent with its own constitutional responsibilities, allow the government to turn FOIA’s judicial review process into “a meaningless judicial imprimatur” for the government’s foreign affairs decisions. *A. Michael’s Piano, Inc.*, 18 F.3d at 141.

IV. MEANINGFUL JUDICIAL REVIEW DOES NOT THREATEN UNITED STATES FOREIGN POLICY AND IS ESSENTIAL TO PROTECT OTHER VALUES.

The government argues that the judiciary cannot be trusted to review agency classifications *de novo* because foreign governments believe that government secrecy in the United States is ironclad, and the mere possibility of a court disclosing information deemed secret by the executive will seriously undermine foreign policy. This argument strains credibility on two levels. Our society places a premium on government openness, so foreign governments communicating with the United States cannot reasonably expect total secrecy. Moreover, government openness facilitated by meaningful judicial review both checks executive abuses of power and fosters an informed citizenry at home and has been an important U.S. foreign policy objective in its own right.

The notion that foreign governments realistically expect the executive branch to provide absolute secrecy for all inter-governmental communications is untenable. Since Congress amended FOIA in 1974, foreign governments have been on notice that United States courts might order the release of such information. Moreover, the Clinton Order makes clear that no presumption of secrecy attaches to foreign government communications, even when confidentiality is expected. *Compare* Clinton Order, §§ 1.2(a)(4), 1.5(b), with Exec. Order 12,356, 3 C.F.R. § 1.3(a)(3) (1983).

Foreign governments are also surely aware of the frequent leaks, both authorized and unauthorized, of foreign affairs information by executive branch officials. See Secrecy, Report of the Commission on Protecting and Reducing Government Secrecy, S. Rep. No. 103-105-2 at A-3. (1977) (“Classified documents are routinely passed out to support an administration; weaken an administration; advance a policy; undermine a policy.”). Recent newspaper articles, for example, discuss in detail communications between President Clinton and Prime Minister Blair concerning the targeting of specific sites and military campaigns in Kosovo.¹⁹ When national newspapers already have access to such high-level communications regarding military secrets, it is entirely unrealistic to suggest that

¹⁹ See, e. g., Dana Priest, *Bombing by Committee: France Balked at NATO Targets*, Wash. Post, Sept. 20, 1999 at A1 (detailing the contents of a target selection document from the air campaign in Kosovo circulated to President Clinton, Prime Minister Tony Blair of Great Britain, and President Jacques Chirac of France; the article also reports the contents of long conversations between the three leaders over target selection); Dana Priest, *The Battle Inside Headquarters: Tension Grew with Divide over Strategy*, Wash. Post, Sept. 21, 1999 at A1 (analyzing the conversations conducted over top-secret video-conference by the military leaders in the Kosovo war, including General Wesley Clark, chief of NATO forces).

foreign governments have any expectation of confidentiality that will be seriously undermined by the mere possibility of judicially-ordered disclosures of government-to-government communications.

In support of its claim that dire consequences will result from court-ordered disclosure, the government relies principally on a 1971 statement by then-Secretary of State William Rogers regarding comments by certain foreign diplomats with respect to publication of the Pentagon Papers at issue in *New York Times v. United States*, 403 U.S. 713 (1971). The example of the Pentagon Papers, however, demonstrates how unrealistic are the government's claims. Secretary Rogers' concerns were not borne out. The Solicitor General who argued that very case, with the benefit of nearly twenty years' hindsight, concluded those concerns were unjustified: "I have never seen any trace of a threat to the national security from the publication. I have never even seen it suggested that there was such an actual threat." Erwin N. Griswold, *Secrets Not Worth Keeping*, Wash. Post, Feb. 15, 1989, at A25.

The government's brief pays scant attention to the values furthered by promoting freedom of information.²⁰ Indeed, the government's suggestion that under the Clinton Order disclosure of government-to-government communications should generally be limited to "routine scheduling information or congratulatory/condolence messages from certain governments," Pet. Br. 34, stands in stark contrast to the government's recognition before other audiences that

²⁰ The Senate Report on the 1974 Amendments stated: "Since the First Amendment protects not only the right of citizens to speak and publish, but also the receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression." Source Book at 154.

FOIA implements a basic human right. In a 1994 report to the United Nations on the state of human rights and freedoms in this country required under the International Covenant on Civil and Political Rights, the U.S. Department of State reported that "Freedom of speech []encompasses certain rights to seek and receive information This constitutional right has been supplemented by a number of laws promoting access to government, such as the Freedom of Information Act."²¹

The United States has long recognized the value of openness in government. As James Madison famously pronounced, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . And a people who mean to be their own Governors must arm themselves with the power which knowledge gives." *The Writings of James Madison* 103 (G. Hunt ed., 1910). Although accommodations to the concerns of foreign countries are no doubt appropriate in many instances – and the executive will have the opportunity to explain the reasons for such accommodation in any future FOIA case – there is no legal justification for presuming that United States information policy must automatically fall to the level of any country with which it deals.

²¹ Civil and Political Rights in the United States, Initial Report of the United States of America to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights, July 1994, at 157.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Kate Martin
CENTER FOR NATIONAL
SECURITY STUDIES
National Security Archive
2130 H Street, N.W., Suite 701
Washington D.C. 20037
(202) 944-7060

Louis M. Bograd
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-1817

Mark H. Lynch
Counsel of Record
Jay T. Smith
Elizabeth A. Snodgrass
Gregory M. Williams
Gerald J. Russello
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5544

Steven R. Shapiro
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Amici Curiae

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